138-134

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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

No. ~~771.~~ 450

SILAS TUBBS, PLAINTIFF IN ERROR,

vs.

R. E. WILHOIT AND R. B. THOMPSON, EXECUTORS OF THE ESTATE OF JOSEPH KILES, DECEASED.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

FILED SEPTEMBER 21, 1888.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

No. 771.

SILAS TUBBS, PLAINTIFF IN ERROR,

vs.

R. E. WILHOIT AND R. B. THOMPSON, EXECUTORS OF THE ESTATE OF JOSEPH KILES, DECEASED.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, DECEMBER 12, 1889.

1 No. 11735.

In the Supreme Court of the State of Caiifornia.

SILAS TUBBS, Plaintiff and Respondent.
vs.
R. E. WILHOIT and R. B. THOMPSON, Executors of the Last Will and Testament of JOSEPH KILE, Deceased, Defendants and Appellants.

Transcript on Appeal from the Superior Court of San Joaquin County, Cal.

J. B. Hall, attorney for appellants; Jos. H. Budd, attorney for respondent.

Endorsed: Filed August 2d, 1886. J. D. Spencer, clerk, per J. S. Williams, deputy.

2 In the Superior Court of the State of California, Held in and for the County of San Joaquin.

SILAS TUBBS, Plaintiff,
vs.
JOSEPH KILE, Defendant.

Complaint.

Plaintiff complains of defendant and alleges—

3 That plaintiff was, on the 1st day of February, A. D. 1875, and ever since has been and now is the owner, seized in fee of, and entitled to the possession of the following-described premises in said county of San Joaquin, viz: Commencing at the northeast corner of the south half of the southeast quarter of section eleven, township four north, range five east, of Mount Diablo base and meridian, running thence south along the section line to the southeast corner of said section eleven; thence west along section line about 160 rods to an old post and board fence; thence northerly along the line of said post and board fence about 80 rods to the northerly line of the south half of the southeast quarter of said section eleven; thence east and in a direct line to the point of beginning, and containing about 80 acres.

That, the plaintiff being so the owner and entitled to the possession thereof, the defendant, on the 2d day of February, A. D. 1875, entered into and upon said premises and ousted the plaintiff therefrom, and has ever since said 2d day of February, A. D. 1875, unlawfully withheld and now unlawfully withholds from the plaintiff the possession thereof, to his damage three thousand dollars.

That the value of the use and occupation of said premises since said 2d day of February, A. D. 1875, and while the plaintiff has been excluded therefrom by defendant, is three thousand dollars.

4 Wherefore plaintiff demands judgment against defendant for the possession of said premises, for the sum of three thousand dollars, the plaintiff's damages by the withholding of the same, and for the further sum of three thousand dollars, the value of the use and occupation thereof, together with his costs of this action.

J. H. & J. E. BUDD,
Attorneys for Plaintiff.

(Endorsed:) Filed January 20, 1880. H. W. Weaver, cl'k, by J. L. Phelps, deputy.

Order of Substitution.

(Title of court and cause.)

In open court, December 14, 1885: On motion of the plaintiff, by his attorney, Jos. H. Budd, Esq., and suggestion of the death of the defendant since the commencement of this action, it was ordered by the court that R. E. Wilhoit and R. B. Thompson, executors of the last will and testament of said deceased, be, and they are, substituted as defendants herein in the place and stead of the said deceased.

5 *Order for Leave to File Amended Answer.*

(Title of court and cause.)

In open court, January 4, 1886: On motion of the defendants, by their attorney, J. B. Hall, Esq., it was ordered that said substituted defendants have leave to file an amended answer to the complaint of said plaintiff.

Amended Answer.

(Title of court and cause.)

The said Reese B. Thompson and R. E. Wilhoit, executors of the last will and estate of Joseph Kile, the original defendant herein, and substituted in his place and stead as defendants, now, by leave of the court, file an amended answer to the plaintiff's complaint in this action, and, answering the same, do say:

They deny that on the 1st day of February, A. D. 1875, or that at any time since that date or now the said plaintiff was or is either the owner or seized in fee or entitled to the possession of the said land or of any part of the said land and premises described in the said complaint.

They deny that the said Joseph Kile on the 2d day of February, A. D. 1875, or at any time whatever entered into or upon the
6 said premises or any part thereof and ousted the said plaintiff therefrom; and they deny that either the said Kile or these defendants ever at any time unlawfully withheld or do now unlawfully withhold from the said plaintiff the possession of the said land or any part thereof.

These defendants admit that the said Joseph Kile was on the 2d day of February, A. D. 1875, and from that time until the time of

his death in the possession of a part of the said tract of land, and that since his said death these defendants, as executors, have been and now are in the possession of the said part; but the defendants deny that the possession of the said part by the said Kile and these defendants was or is unlawful, or that his or their withholding of possession from said plaintiff was or is unlawful.

And defendants deny that said plaintiff has sustained damage by such withholding to three thousand dollars or to any sum of money whatever.

And defendants deny that the use and occupation of said premises since said 2d day of February, A. D. 1875, was or is of the value of three thousand dollars or of any value exceeding the sum hereinafter mentioned; and they aver that the value of such use and occupation did not and does not exceed the sum of four hundred dollars.

7 And for a further defense to said action these defendants deny each and every allegation in the said complaint contained, except as hereinbefore admitted.

And for a further and separate defense the defendants allege that the said Joseph Kile was, on the 1st day of February, A. D. 1875, and thence until the time of his death, the owner, seized in fee, and entitled to the possession of the said tract of land, and that since the death of the said Kile these defendants, as executors as aforesaid, have been and now are entitled to the possession thereof.

And for a further and separate defense the defendants aver that the alleged cause of action for the possession of said premises is barred by the provisions of section three hundred and eighteen (318) of the "Code of Civil Procedure," and the defendants plead and rely upon the said provisions in bar of the maintenance of the action for said alleged cause.

And for a further and separate defense the defendants aver that the alleged cause of action for the recovery of the value of the use and occupation of the said land is barred by the provisions of sections 336, subdivision 2, and 339, subdivision 1, respectively, of the "Code of Civil Procedure," and the defendants plead and

8 rely upon the said several provisions in bar of the maintenance of the action for that alleged cause.

And for a further and separate defense the defendants aver that the alleged cause of action for damages for the withholding is barred by the provisions of sections 338, subdivision 2, and 339, subdivision 1, respectively, of the "Code of Civil Procedure," and of section 3334 of the "Civil Code." and defendants plead and rely upon the said several provisions in bar of the maintenance of the action for that alleged cause.

And for a further defense the defendants aver that on the said 1st day of February, 1875, and continuously thereafter until his death their said testator, Joseph Kile, had and held the occupancy and possession of the said tract of land—that is to say, about seventy — acres thereof under color of title adversely to the claim of the said plaintiff, in good faith, and since said Kile's death the defendants have so as aforesaid had and held the possession thereof; and

they further aver that their said testator grubbed and cleared the said land and by ditches and drains reclaimed and protected the same from overflow and inclosed it with substantial fences, whereby the said land was rendered fit for cultivation, and that the value of the said improvements is the sum of one thousand dollars, and they plead the said value as a set-off to the alleged damages for withholding the said premises.

9 Wherefore they pray to be hence dismissed with costs to them and against the said plaintiff.

J. B. HALL,
Attorney for Defendants.

Filed January 6, 1886.

C. W. YOLLAND, *Clerk.*

(Title of court and cause.)

Findings.

The court finds the following as the facts in this case:

I.

That on the 1st day of October, 1879, the United States of America issued its patent, which is in due form and substance and properly executed and contains all proper and necessary recitals to render the same valid, and states that the United States of America have given and granted, and by these presents do give and grant, the said Silas Tubbs and to his heirs the south half of the southeast quarter of section eleven, in township four north, range five east, in the district of lands subject to sale at Stockton, California, containing eighty acres, according to the official plat of the survey of the said lands returned to the General Land Office by the

10 surveyor general. Said patent was duly recorded in the office of the recorder of the General Land Office and was delivered to plaintiff October, 1879, and by said patent the United States of America granted and conveyed to plaintiff the S. ½ of the S. E. ¼ of section 11, T. 4 N., R. 5 E., of Mount Diablo base and meridian, and situate in said county of San Joaquin; and the plaintiff has been ever since the issuance and delivery to him of said patent seized in fee, the owner of, and entitled to the possession of all the land granted by said patent, and including the land sued for in this action, which is described as follows, namely: Commencing at the S. E. corner of the south half of the S E. quarter of said section eleven, and running thence west along section line about 160 rods to line of old post and board fence; thence northerly along said line of old fence about 80 rods to the northerly line of said south half of said S. E. ¼; thence east along said northerly line to section line of said section eleven; thence south along said section line 80 rods to the point of beginning, and containing 75 acres of land.

II.

That Joseph Kile, the original defendant in this action, who is now deceased, was on said 1st day of October, 1879, in the possession of said tract of land sued for and continued in the pos-
11 session thereof until the time of his death, and the defendants, R. E. Wilhoit and R. B. Thompson, as the executors of the last will and testament of said Joseph Kile, who is deceased, have been in the possession of said land and premises ever since the death of said Joseph Kile; and the said Joseph Kile, on the 1st day of October, 1879, and thereafter during his lifetime, unlawfully withheld, and his said executors have ever since his death unlawfully withheld, from plaintiff the possession of said land and premises.

III.

That the value of the rents and profits of said land and premises have been, ever since the said 1st day of October, 1879, three and fifty hundredths dollars per acre per annum, and amounting in the aggregate to seventeen hundred and six and twenty-five hundredths dollars, computed from October 1st, 1879, to the date of these findings.

IV.

That since the commencement of this action said Joseph Kile died, and on the suggestion of his death said executors of his last will, R. E. Wilhoit and R. B. Thompson, were, by the order of this court duly given and made, substituted as defendants in the action in place of said Joseph Kile, then deceased; and in due time
12 after the death of said Joseph Kile the plaintiff presented to said executors for rejection or allowance his claim for damages for the withholding of the possession of said land and premises and for the value of the rents, issues, and profits thereof set forth in the complaint in this action, supported by his affidavit and duly authenticated.

V.

That said Joseph Kile was not on the 1st day of February, A. D. 1875, nor was he at any time thereafter, the owner of or seized in fee of said land and premises sued for, nor was he on October 1st, 1879, or thereafter entitled to the possession of the same, and his said executors have not been entitled to the possession thereof since his death.

VI.

That the cause of action of plaintiff for the possession of said land and premises sued for in this action is not barred by the provisions of section three hundred and eighteen (318) of the Code of Civil Procedure, and the cause of action of plaintiff for the recovery of the value of the use and occupation of said land is not barred by the provisions of sections 336, subdivision 2, and 339, subdivision 1, of the Code of Civil Procedure, nor by the provisions of either of said

subdivisions; and the cause of action of plaintiff for damages
13 for the withholding of said land and premises is not barred by the provisions of sections 338, subdivision 2, and 339, subdivision 1, of the Code of Civil Procedure, and of section 3334 of the Civil Code, nor by either or any of said provisions.

VII.

That the said Joseph Kile on the 1st day of February, 1875, and continuously thereafter until his death, had and held the occupancy and possession of the land and premises sued for under color of title in good faith, and his said executors have had and held possession thereof in good faith since his death; that the title of plaintiff to said land and premises is under a patent issued to him October 1st, 1879, by the United States of America, granting to him said south half of the southeast quarter of said section eleven, in finding No. I hereinbefore mentioned, and which south half of said southeast quarter includes the lands and premises sued for, and said Joseph Kile did not have nor hold the occupancy and possession of said land and premises sued for adversely to said title of the plaintiff thereto from the United States at any time prior to the issuance by the United States to plaintiff of said patent, namely, October 1st, 1879. The said Joseph Kile did not grub nor clear said land sued for nor reclaim or protect the same from overflow by ditches
14 or drains constructed or maintained by him, nor enclose the same nor render it fit for cultivation, and he did not make any improvements on or of said land and there are no improvements on or of said land made or constructed by said Joseph Kile of any value whatever to said land sued for.

VIII.

That the value of the use and occupation of said land sued for and plaintiff's damages for the withholding of the possession thereof since October 1st, 1879, is the sum of seventeen hundred and six and twenty-five hundredths dollars, the said value of the rents and profits thereof in said finding III above mentioned.

IX.

The United States subdivisional survey of said township four (4) north, of range five (5) east, of Mt. Diablo meridian, United States survey of lands in this State, was made in April, 1864; the field and descriptive notes, together with the map or plat of the said survey, was examined and duly approved and the approval duly certified by the United States surveyor general for the State of California, and thereafter, to wit, July 1st, 1864, a copy of said examined and approved map or plat was filed in the United States district land office at Stockton, California, which district then included all the lands of said township.

15 A copy of the said descriptive and field notes was not received at said Stockton district office until on or about May 29, 1879.

By and upon the said approved map or plat the greater part of the lands of said township, including all of section eleven (11), was colored green, and upon the face of this part so colored green the words "swamp and overflowed land" were written, and said lands so colored and marked were excluded from the estimated aggregate area of "public lands" and included in the estimated aggregate area of "swamp and overflowed land," as appears by the marginal table of acres forming a part of said map or plat; the entire section eleven (11) was included in the estimated area of swamp and overflowed land and excluded from the estimated area of public land, and in and by said field-notes and map or plat of said survey the line between the public land and the swamp and overflowed land extended on and along the entire south boundary of section eleven (11) and on and along its east boundary for one-half mile north from the southeast corner of the section, whereby the whole of section eleven (11) was shown to be a part of this large body of swamp and overflowed land and was described, represented, and classed as such by the said field and descriptive notes of the said survey.

X.

That in the month of August, 1864, Joseph Kile, the
16 original defendant in this action, made application, under and in accordance with the provisions of the act of the Legislature of California of April 27th, 1863, concerning State lands, to purchase the said southeast quarter of section eleven (11) from the State as being of the swamp and overflowed lands granted to this State under the provisions of the act of Congress of the United States, approved September 28th, 1850, entitled "An act to enable the State of Arkansas and other States to reclaim swamp lands within their limits," and on the 18th day of said August the county surveyor of said county of San Joaquin, wherein the said land lies, made a survey and recorded in his office a plat and field-notes thereof, and which field-notes are as follows:

"Land survey of swamp and overflowed lands, survey No. 958, township 4 north, range 5 east, section 11, Mt. Diablo base and meridian, S. E. ¼ of sec. 11, containing 160 acres: Beginning at the common corner of sections 11, 12, 13, and 14, T. 4 N., R. 5 E., and running thence north 40.00 chains, thence west 40.00 chains to center of section 11, thence south 40.00 chains, thence east 40.00 chains to the point of beginning. Surveyed for Joseph Kile. Run by true meridian."

The county surveyor certified and reported to the State
17 surveyor general the said plat and field-notes, and the same were received and filed in the office of the State surveyor general, and on the 30th day of September, 1864, the said survey and plat and field-notes thereof were approved of record by said State surveyor general.

XI.

On the 30th day of September, 1864, and after the said State surveyor general had approved the said survey, plat, and field-notes

(as in finding X stated), the State of California issued and delivered to said Joseph Kile a certificate of purchase of and for the said southeast quarter of said section eleven (11), founded upon his said application and the said approved survey.

The certificate of purchase sets forth that said Kile had made part payment of the purchase price and was the purchaser of the land, and that on making full payment and surrendering the certificate he should receive a patent for the land from the State.

XII.

On the 5th day of August, 1865, the said Kile (having paid the residue of the purchase-money and surrendered the said certificate) received from the State a patent for the land named in said certificate.

18 This patent is signed and countersigned by the Governor, secretary of state, and register of the State land office, with the seal of the State thereto affixed, and it recites said act of Congress of September 28th, 1850, and the acts of the Legislature of this State of April 21st, 1858, providing for the sale and reclamation of the swamp and overflowed lands of the State; of April 18th, 1859, amendatory of said last-named act, and the act of April 29th, 1861, providing for the entry of lands in certain cases and for the issuance of patents therefor, and the act of April 27th, 1863, providing for the sale of certain lands belonging to the State; and further recites that it appears by the certificate of the register of the State land office, No. 325, bearing date July 18, 1865, that he had been duly notified by the county treasurer that Joseph Kile has paid one hundred and sixty dollars in full payment for one hundred and sixty acres of swamp and overflowed land in San Joaquin county and described as follows. (Here follows a description of the land as set forth in finding X.) And said patent sets forth that all the requirements of the act of Congress, as well as the act of the State Legislature, in relation to swamp and overflowed lands had been complied with, and that the Governor of the State, by virtue of authority in him vested, thereby granted, bargained, sold, and conveyed unto Joseph Kile, his heirs and assigns forever, the said tract of land, with the appurtenances thereunto belonging.

19 XIII.

That on or about June 15, 1865, the said township plat, which was on file in the said Stockton land office, was withdrawn from said office by the United States surveyor for California by the order of the Commissioner of the General Land Office, and has never been returned to said Stockton land office nor to any land office in California.

XIV.

On the 27th day of May, 1867, and again on the 18th day of June, 1867, the surveyor general of this State notified the register of the United States Land Office, by written notice filed with said

register at Stockton, California, that being the office of the land district embracing said land, that the State of California had selected and sold the S. E. ¼ of said section eleven (11) as a part satisfaction of the said grant of swamp and overflowed lands to the State.

XV.

Before the 8th day of May, 1873, no claim, filing, or entry to or upon the said south half of the southeast quarter of said section eleven (11) for pre-emption, homestead, or other purposes under the laws of the United States was presented or made of record, and no rights of pre-emption or homestead settlers or claimants had attached to said premises.

XVI.

On the 8th day of May, 1873, the plaintiff made an original homestead entry of said south half of the southeast quarter of section eleven, and on the 18th day of November, 1873, the said homestead entry was commuted by plaintiff to a cash entry. The application and affidavit of plaintiff for said original homestead entry stated all the facts and otherwise conformed to all the provisions of the homestead laws of the United States for such entry, and said plaintiff, in commuting the same to a cash entry, made proof of settlement and cultivation, residence and improvement, as provided by law granting pre-emption rights, and in all respects complied with the provisions of said homestead laws of the United States in respect to such commutation to a cash entry. Said patent to plaintiff in finding I mentioned was based on said homestead entry and said commutation thereof to a cash entry.

XVII.

On the 7th day of May, 1873, the plaintiff made final proof and pre-emption entry under the pre-emption laws of the United States of America of the south half of the southwest quarter of said section eleven (11).

21

XVIII.

That in April, 1869, and again in February, 1870, the United States surveyor general for California, under and by the order and direction of the Land Department of the United States, investigated in regard to the swampy character of said south half of the south half of said section eleven and took evidence in relation thereto, and on such investigation and evidence said surveyor general determined that said land was not of a swampy character, but was dry land and fit for cultivation, and said surveyor general reported said investigation, evidence, and determination to the Commissioner of the General Land Office, who approved of the same, and on the 2d day of February, 1872, decided that said land was dry and fit for cultivation.

XIX.

The said original official township plat (referred to in finding IX) was prepared in triplicate, and one thereof was returned to the General Land Office of the United States. After said withdrawal of said plat filed in the office of the United States register at Stockton (in finding XIII mentioned), the Commissioner of the General Land Office, on the 20th day of February, 1868, made a true copy of said plat then on file in said General Land Office, together with
22 the marginal table of areas and certificate of approval thereon in finding IX mentioned, and upon the margin of said copy the Commissioner made and signed a certificate of which the following is a copy, to wit:

GENERAL LAND OFFICE, }
February 20th, 1868. }

I hereby certify that this is a correct copy of the plat of township 4 north, range No. 5 east, M. D. M., on file in this office.

JOS. S. WILSON, *Comm'r.*

Said copy of said plat was also certified to in due form and substance by the surveyor general of the United States for California, and said copy so certified to was thereafter filed in the United States land office for the land district then embracing said township four north, range five east. Said copy in no respect, except as to said certificate of said Commissioner of the General Land Office thereto, differed from said plat which was withdrawn, as in said finding XIII mentioned.

XX.

On the 17th day of May, 1870, the United States surveyor general for California reported to the Commissioner of the General Land Office that the south half of the south half of said section
23 eleven (11) had been adjudicated by jury and the court adversely to the claim of the State under the swamp-land act; but in fact no such adjudication has been made except as to the south half of the southwest quarter of said section eleven.

On the 14th day of December, 1870, the Commissioner of the General Land Office instructed the said surveyor general to change the segregation line between the swamp and overflowed lands and public lands as it appeared on the plat approved June 30, 1864, by extending the said line one-fourth of a mile further north and to make such other changes in said plat and the estimated respective areas of swamp and overflowed lands and public lands as were required to represent and show said south half of the south half of said section eleven public land and not swamp and overflowed land.

On or about December 27th, 1870, the said United States surveyor general made said required change and alteration on the plat of

said township in his office and instructed the register of the United States land office at Stockton to make the same change and alteration on the plat of said township in said land office, and thereupon and in said month of December, 1870, said required change and alteration on the said plat in said register's office was made by the register of said office, whereby the said segregation line was
24 carried one-fourth of a mile to the north of its original location and the green coloring of the said south half of the south half was erased and said south half of south half shown and represented to be public land and not swamp and overflowed.

XXI.

On the 28th day of May, 1870, the State surveyor general notified the General Land Office of the United States that the State claimed the said south half of the south half of section eleven under the first section of the act of July 23d, 1866, entitled "An act to quiet land titles in California," as having been selected and sold by the State as swamp and overflowed land to a *bona fide* purchaser prior to the passage of said act.

XXII.

After the said homestead commutation entry by said plaintiff, and at the instance of the said Kile, the Commissioner, on the 30th day of January, 1874, ordered a hearing for the purpose of testing the validity of said claim of the State under the first section of said act of July 23d, 1866.

Such proceedings were had under an investigation by the Land Department of the United States in pursuance of said order that the said Department, on or about July 15, 1879, adjudged and determined—
25 First. That by a decision of the Commissioner on the 2d day of February, 1872, the said south half of the south half of section eleven (11) was dry and fit for cultivation.

Second. That the State's claim to the said south half of the southeast quarter of said section eleven rested upon the alleged selection and sale as affected by the first section of the said act of July 23d, 1866.

Third. That the State's claim to confirmation under that section be overruled because the said section had no reference to swamp-land claims and selections by the State.

Fourth. And that patent be issued to said Tubbs (the plaintiff) upon said commuted homestead entry.

XXIII.

After the issuance of said patent to the plaintiff the State of California applied to the Land Department of the United States, claiming that the State was entitled, in respect to said tract, to the benefit of the first and second clauses of section four (4) of the said act of July 23, 1866, and the provisions also of section 2479 and the first and second clauses of section 2488 of the Revised Statutes of the

United States, and that said tract of land be accordingly
26 certified over to the State, because the said tract, before the act of July 23, 1866, had been segregated and represented by the township survey and plat of the United States as swamp and overflowed, and had been segregated also by the State as swamp and overflowed by the said survey (stated in finding X hereof), conforming to the United States system of surveys made before the passage of the said act of July 23, 1866, and the passage of said provisions of the Revised Statutes and before the said original homestead entry of the said Tubbs (the plaintiff).

XXIV.

On the 15th day of January, 1883, the Commissioner of the General Land Office denied the said application, and upon the only ground, as stated in said denial, that, said tract of land having been patented to said Tubbs, the General Land Office had no authority to review the decision of the Department directing said patent to be issued to said Tubbs, and on appeal by the State from this action of the Commissioner to the Secretary of the Interior the said Secretary, on December 21, 1883, affirmed the said Commissioner's decision and dismissed the said application of the State, and upon the only ground, as stated in his decision, that all jurisdiction of the Land Department over the title ceased when it issued said patent.

27 XXV.

The certificate of approval by the United States surveyor general for California of the plat of the survey in finding IX mentioned was written upon the margin of the said plat and is in the following words and figures, to wit:

The above map of township No. 4 north, range No. 5 east, Mount Diablo meridian, is strictly conformable to the field-notes of the survey thereof on file in this office, which have been examined and approved.

Surveyor general's office, San Francisco, California, June 30, 1864.

L. UPSON,
Surv. Gen., Cal.

And the court finds as conclusions of law that the plaintiff is entitled to judgment against the defendants, R. E. Wilhoit and R. B. Thompson, executors as aforesaid, for the recovery of the possession of the land and premises described in the complaint in this action, for the recovery of the possession of which this action is brought, and for the sum of seventeen hundred and six and twenty-five hundredths dollars, plaintiff's damages for the withholding from him the possession of said land and premises, together with his

costs in this action, said money damages and costs to be paid
28 in the due course of administration of the estate of Joseph Kile, deceased.

Let judgment be entered accordingly.

Dated June 7, 1886.

J. G. SWINNERTON, *Judge.*

Filed June 7, 1886.

C. W. YOLLAND, *Clerk.*

(Title of court and cause.)

Judgment.

This cause came on regularly for trial on the 8th day of February, A. D. 1886, Joseph H. Budd, Esq., appearing as counsel for the plaintiff, and J. B. Hall, Esq., for defendants. A trial by jury having been expressly waived by the counsel for the respective parties the cause was tried before the court sitting without a jury, whereupon witnesses on the part of plaintiff and defendants were duly sworn and examined and documentary evidence was introduced, and, the evidence being closed, the cause was submitted to the court for consideration and decision, and, after due deliberation thereon, now, on the 7th day of June, 1886, the court delivers its findings and
29 decree and orders that judgment be entered herein in favor of Silas Tubbs, the plaintiff, in accordance therewith. Wherefore, by reason of the law and the findings aforesaid, it is ordered, adjudged, and decreed that Silas Tubbs, the plaintiff in this action, have and recover from said R. E. Wilhoit and R. B. Thompson, executors of the last will and testament of Joseph Kile, deceased, defendants in this action, the possession of the following-described real property situated in the county of San Joaquin, State of California, and bounded as follows, namely: Commencing at the southeast corner of the south half of the southeast quarter of section eleven, in township four north, range five east, of Mt. Diablo base and meridian, and running thence west along section line about one hundred and sixty rods to the line of an old post and board fence; thence northerly along said line of old fence about 80 rods to the northerly line of said south half of said southeast quarter of said section eleven; thence east along said northerly line to east section line of said section eleven; thence south along section line eighty rods to the point of beginning, and containing seventy-five acres of land; and, further, that said plaintiff have and recover of the defendants the sum of seventeen hundred and six and twenty-five hundredths dollars damages for the withholding thereof and for the rents and profits thereof, and sixty-two and sixty-five hundredths dollars ($62.65), plaintiff's costs and
30 disbursements incurred in the action, said money damages and costs to be paid in due course of administration of the estate of Joseph Kile, deceased.

Judgment entered June 28, 1886, in Book A, volume 2, page 601.

Notice of Appeal.

(Title of court and cause.)

To Silas Tubbs, the plaintiff, and Joseph H. Budd, Esq., his attorney:

You are hereby notified that the said defendants take an appeal to the supreme court of the State of California from the judgment of said superior court herein entered on the 28th day of June, A. D. 1886, against the said defendants and in favor of the said plaintiff for the recovery of the possession of the land and premises in the said judgment described and for the sum of seventeen hundred and six and twenty-five hundredths dollars, together with costs of suit—$62.65—and from every part of said judgment.

J. B. HALL,
Attorney for the Defendants.

July 8, 1886.

31 Due service of the foregoing notice of appeal and receipt of copy thereof admitted this 8th day of July, A. D. 1886.

J. H. BUDD,
Attorney for Plaintiff.

Filed July 8, 1886.

C. W. YOLLAND, *Clerk.*

Certificate and Stipulation of Attorneys.

(Title of court and cause.)

It is hereby stipulated and certified that the foregoing printed transcript contains a correct copy of each of the following papers on file and of record herein with the clerk of said court and of the several endorsements thereon, namely, complaint, order of substitution, order for leave to file amended answer, amended answer, findings and decision of the court, judgment of the court, notice of appeal, and that an undertaking in due time and form has been properly filed herein.

Dated this 17th day of July, A. D. 1886.

JOS. H. BUDD,
Attorney for Plaintiff.
J. B. HALL,
Attorney for Defendants.

32 Due service of the within transcript and receipt of a copy thereof acknowledged this 17th day of July, 1886, the appellants requesting respondent's certificate to the correctness thereof.

JOS. H. BUDD,
Attorney for Plaintiff and Respondent.

I hereby certify that a copy of the within transcript was deposited with me this 17th day of July, 1886, to be delivered to the judge who presided at the trial of said cause in the superior court.

C. W. YOLLAND, *Clerk,*
By A. R. BOGUE, *Deputy.*

33 *Submission of Cause.*

In the Supreme Court of the State of California. Department Two.

TUBBS
v.
WILHOIT *et al.* } 11735.

1887.
May 12. Ordered submitted on briefs on file.

THE COURT.

(Title court and cause.)

1887.
July 18. Filed petition for rehearing.

(Title court and cause.)

July 30. Rehearing denied.

THE COURT.

34 In the Supreme Court of the State of California. No. 11735.
Department Two.

SILAS TUBBS, Respondent,
vs.
R. E. WILHOIT and R. B. THOMPSON, Executors of the Last Will and Testament of Joseph Kile (Deceased), Appellants.
} On Appeal from the Superior Court in and for the County of San Joaquin.

And now, at this day, this cause being called and having been heretofore submitted and taken under advisement, and all and singular the law and premises having been fully considered, the opinion of the court herein is delivered by Thornton, J.

We concur:

SHARPSTEIN, *J.*
McFARLAND, *J.*

Whereupon it is adjudged and decreed by the court that the judgment of the superior court in and for the county of San Joaquin in the above-entitled cause be, and the same is hereby, reversed, and cause remanded, with directions to the court below to enter judgment for the land in suit and the rents and profits in favor of the defendants.

35 *Opinion.*

In the Supreme Court of the State of California. Department Two.

(Filed July 1, 1887.)

TUBBS *vs.* WILHOUT *et al.* } No. 11735.

This is an action of ejectment.

The plaintiff's title is founded on a patent of the United States, issued on homestead entry, commuted to a cash entry, which entry was made on the 8th of May, 1873. On this last-named day whatever right the plaintiff had attached.

The defendants' title rests on a patent of the State of California issued to one Joseph Kile on the 5th day of August, 1865, for the land in controversy purchased by said Kile from the State on an application to purchase made to the proper State authorities in the month of August, 1864.

The plaintiff claims that the land is and was dry land on the 28th of September, 1850, the date of the passage of the swamp-land act, while defendants (who are the executors of Kile) claim that it was swamp and overflowed land at the date just above mentioned, and that it was conclusively determined to be such before any right of plaintiff attached.

It appears from the findings that in April, 1864, a plat of the survey of the township in which the land in controversy is situated was approved by the United States surveyor general for California. On this approved township plat the land in suit was represented to be swamp and overflowed.

On the 23d of July, 1866, an act of Congress entitled "An act to quiet land titles in California" was passed. The fourth section of that act provides, among other things, as follows: "That in all cases where township surveys have been or shall hereafter be made under the authority of the United States, and the plats thereof approved, it shall be the duty of the Commissioner of the General Land Office to certify over to the State of California as swamp and overflowed all the lands represented as such upon such approved plats within one year from the passage of this act or within one year from the return and approval of such township plats."

It must be considered as settled law that the first section of the swamp-land act is a grant *in præsenti* to each State of the swamp and overflowed lands within its limits. "The words of the first section of the act," say the Supreme Court of the United States in Wright *vs.* Roseberry (121st U. S. Rep., 488, by Field, J.), "'shall be and are hereby granted' import an immediate transfer of interest, not a promise of transfer in the future." The provision made for a patent in the second section is for the purpose of furnishing to the grantee documentary evidence that the land was swamp and overflowed, and a further assurance of title. (See Owens *vs.* Jackson, 9

Cal., 322; Summers *vs.* Dickenson, *id.*, 554; Kernan *vs.* Griffith, 27 *id.*, 87; Sacramento Valley Rec. Co. *vs.* Cook, 61 Cal., 342; Lux *vs.* Haggin, 10 Pac. Rep., 674; French *vs.* Fyan, 93 U. S., 169; Wright *vs.* Roseberry, 121 U. S. Rep., 488, and cases cited.)

To make the grant perfect the lands must be identified as of the character granted. When the land was clearly swamp and overflowed it could be clearly identified as such by parol evidence. In most cases such identification from the character of the lands could be made without difficulty. In some instances it might not be so easily done, and Congress provided in the act of 1850 for a mode of identification by the Secretary of the Interior. This action by the Secretary of the Interior in identifying the land as swamp and overflowed is conclusive against collateral attack as the judgment of a special tribunal to which the determination of the matter is submitted, and when the Secretary has neglected or failed to make the identification it is competent for the State or its grantees to prevent their rights from being defeated to identify the lands in any other appropriate mode which will effect that object, as by a resort to parol evidence. (Wright *vs.* Roseberry, 121 U. S. Reps., 488, and cases cited.)

But Congress has furnished other modes of identification, and one of those is set forth in the portion of the fourth section of the act of 1886 above quoted. (Wright *vs.* Roseberry, *supra.*)

That the township plat was approved in this case long before any right of the plaintiff attached clearly appears from the findings. A copy of the plat approved by the United States surveyor general for California was filed in the United States district land office at Stockton, in which district the land in suit was included, on the 1st of July, 1864. This copy was afterward, on or about July 15, 1865, withdrawn from the office by the surveyor general above mentioned by order of the Commissioner of the General Land Office, and was never returned to that office, but an exact copy of it was subsequently filed in the United States land office for the district then embracing, with other lands, the land in controversy.

We think it clear from the above that the plat must be considered as approved, at least as soon as when first filed in the land office in Stockton.

From the day of filing an approved township plat in the proper land office the time for making applications to enter and purchase commences to run. From such date rights may attach in favor of those applying to enter and purchase under the laws of the United States, and certainly such rights would not be allowed to attach unless upon a township plat approved by the proper authority. Under these circumstances the township plat may be considered as approved at latest as of July 1, 1864.

Under such a state of facts, what effect on the title to this land has the above-quoted portion of the act of July 23, 1866? We are of opinion that the plat of the survey of the township, including the lot in controversy approved by the United States surveyor general for California, was conclusive between the State and the United States and vested the title in the State of California as of the

28th of September, 1850, the date of the passage of the swamp-land act.

This conclusion is, in our opinion, sustained by the recent decision of the Supreme Court of the United States in Wright *vs.* Roseberry, above cited. This case went to the court above mentioned by writ of error to this court. The action was ejectment. The plaintiff contended that by virtue of the provisions of section 4 of the act of July 23, 1866, there having been an approved plat of survey of the land in suit, claimed by plaintiff to be swamp and overflowed land, vested in the State through the Commissioner of the General Land Office, had never certified the land over to the State as required by the act above mentioned. The defendants, who claimed as pre-emptors under the laws of the United States and to whom patents had been issued by the United States upon declaratory statements made in 1864, combated this view, and the State court sustained the contention of defendants, holding that until the Commissioner had made the certificate required by the act the title did not vest in the State. The Supreme Court of the United States held that this was erroneous, and for this error reversed and remanded the cause. Its ruling is that the township plat having been returned to the General Land Office after the patents to the defendants were issued, were not conclusive against the United States that the land was swamp and overflowed, but if the township plat had been approved before the patents were issued it would have been conclusive that the lands sued for were of that character, and that the certificate of the Commissioner is only an official recognition that the lands are of the character designated and of the completeness of the segregation. We understand this ruling of the highest court
36 of the United States to be that when the plat of the township representing lands upon it to be swamp and overflowed is approved, the title to such land vests in the State, though the Commissioner has not made the certificate required by the act.

Though in the case of Wright *vs.* Roseberry the plat of the township survey was required under another section of the act of 1866 to be approved both by the United States surveyor general for California and by the Commissioner of the General Land Office, still, when it was approved, the same effect resulted—that is to say, when the plat of survey with the representation on it required by the act had been approved the title to the land designated on it as swamp and overflowed vested in the State.

In the case before us the approval was only required to be made by the United States surveyor general, and when this was done the result followed as above pointed out. In this view we think the ruling of the supreme court in Wright *vs.* Roseberry sustains the conclusion here reached.

In this cause nothing had occurred by which the plaintiff could have acquired a semblance of right until long after the plat of the township survey had been approved and the title had vested in the State. Therefore, in accordance with the ruling of the United States Supreme Court, when the patent herein was issued the United States had nothing which it could grant to the plaintiff. The patent to

the plaintiff was then issued without authority of law and as against the defendants and their testator was of no validity whatever.

In the conclusion here reached we have followed the decision of the supreme court in Wright *vs.* Roseberry overruling the decision of this court in the same case. As the question involved is a Federal one, depending on the construction of an act of Congress, we are bound to follow the decision of the Federal court on the points in controversy and to disregard the decision of this court on the same points.

There is nothing said in Heath *vs.* Wallace (11 Pac. Rep., 842) which is not in accord with what is said herein. In that case the land was not represented on the approved township plat as swamp and overflowed, but "subject to periodical overflow." We held that this was not representing the land as swamp and overflowed. There is in this State, and it may be presumed in every other State, lands which are subject to periodical overflow, but which are eminently fit for cultivation and on which valuable crops of cereals are grown. Such lands are not swamp and overflowed, as has been held by this court. (See People *vs.* Morrill, 26 Cal., 336; Keeran *vs.* Griffith, 31 *id.*, 461; Keeran *vs.* Allen, 33 *id.*, 542.)

We add here that it appears from the findings herein that a hearing was in 1874 ordered by the Commissioner of the General Land Office as to whether the land involved in this case was or not swamp and overflowed, and that such hearing was subsequently had on which it was determined that it was not swamp and overflowed; but the order for a hearing was made after the title had vested in the State, and therefore the decision of the Federal Land Department that the land was not swamp and overflowed was of no validity whatever. Had any right been claimed by a pre-emptor prior to the approval of the township map such hearing might have been ordered and had by the Commissioner, but certainly this cannot be so when all right had passed from the United States to its grantee.

The title to the land under such circumstances had passed entirely beyond the control of the United States Land Department and beyond the power of the Federal Government, unless the title had been procured by fraud, to redress which resort must be had not to the Land Department, but to the judicial courts.

The judgment is reversed and the cause remanded with directions to the court below to enter judgment for the land in suit and the rents and profits in favor of the defendants. So ordered.

THORNTON, *J.*

We concur:

SHARPSTEIN, *J.*

McFARLAND, *J.*

37 In the Supreme Court of the United States.

SILAS TUBBS, Plaintiff in Error,
vs.
R. E. WILHOIT and R. B. THOMPSON, Executors of the Last Will and Testament of Joseph Kile, Deceased, Defendants in Error.

Know all men by these presents that we, H. C. Shaw and E. L. Colnon, of the county of San Joaquin, State of California, are held and firmly bound unto R. E. Wilhoit and R. B. Thompson, executors of the last will and testament of Joseph Kile, deceased, in the full and just sum of three hundred dollars, to be paid to the said R. E. Wilhoit and R. B. Thompson, executors as aforesaid, their certain attorney, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this seventeenth day of August, in the year of our Lord one thousand eight hundred and eighty-eight.

38 Whereas lately, at a session of the supreme court of the State of California, in a suit depending in that court between Silas Tubbs, respondent therein, and R. E. Wilhoit and R. B. Thompson, executors of the last will and testament of Joseph Kile, deceased, appellants therein, final judgment was rendered against said Silas Tubbs, and the said Silas Tubbs having prosecuted a writ of error in the Supreme Court of the United States to reverse the judgment aforesaid, and a citation being about to be issued, directed to the said R. E. Wilhoit and R. B. Thompson, executors as aforesaid, citing and admonishing them to be and appear at a Supreme Court of the United States to be holden at Washington the second Monday of October next:

Now, the condition of the above obligation is such that if the said Silas Tubbs shall prosecute his writ of error to effect and answer all damages and costs if he fail to make his plea good, then the

39 above obligation to be void; else to remain in full force and virtue.

H. C. SHAW. [SEAL.]
E. L. COLNON. [SEAL.]

Sealed and delivered in the presence of—
JOSEPH H. BUDD.

UNITED STATES OF AMERICA, } *ss:*
District of California, }

H. C. Shaw and E. L. Colnon, being duly sworn, depose and say and each for himself saith that he is worth the sum of six hundred dollars over and above all just debts and liabilities and exemptions.

H. C. SHAW.
E. L. COLNON.

Sworn to this 17th day of August, 1888, before me—
[SEAL.] FRANK E. DUNLAP,
Notary Public.

40 [Endorsed:] 11735. In the Supreme Court of the United States. Silas Tubbs, plaintiff in error, *vs.* R. E. Wilhoit and R. B. Thompson, executors of the last will and testament of Joseph Kile, deceased, defendants in error. Bond on writ of error.

Endorsed: Filed Aug. 23, 1888. J. D. Spencer, clerk, by Ben. M. Maddox, deputy. I approve the within bond and the sureties thereto. Aug. 18th, 1888. Searls, C. J., supreme court, State of Cala.

41 In the Supreme Court of the United States.

SILAS TUBBS, Plaintiff in Error,
vs.
R. E. WILHOIT and R. B. THOMPSON, Executors of the Last Will and Testament of Joseph Kile, Deceased, Defendants in Error.

The United States of America to R. E. Wilhoit and R. B. Thompson, executors of the last will and testament of Joseph Kile, deceased, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of California, wherein Silas Tubbs is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, in the said writ of error mentioned, should not be corrected and why speedy justice should not
42 be done to the parties in that behalf.

Witness the Honorable Niles Searls, chief justice of the supreme court of California, this eighteenth day of August, in the year of our Lord one thousand eight hundred and eighty-eight.

NILES SEARLS,
Chief Justice Supreme Court of California.

I admit service of within citation this 18th day of August, 1888.
J. B. HALL,
Att'y for R. E. Wilhoit & R. B. Thompson, Executors of Last Will and Testament of Joseph Kile, Deceased, Defendants in Error.

43 Endorsed: In the Supreme Court of the United States. Silas Tubbs, plaintiff in error, *vs.* R. E. Wilhoit and R. B. Thompson, executors of the last will and testament of Joseph Kile, deceased, defendants in error. Citation to appear.

Endorsed: Filed Aug. 23, 1888. J. D. Spencer, clerk, by Ben. M. Maddox, deputy.

44 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the justices of the supreme court of the State of California, Greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said supreme court, before you, between Silas Tubbs, plaintiff in error, and R. E. Wilhoit and R. B. Thompson, executors of the estate of Joseph Kile, deceased, defendants in error, a manifest error hath happened, to the great damage of the said plaintiff in error, as by his complaint appears, and it being fit that the error, if any there hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at the city of Washington, in the District of Columbia, on the second Monday of October next, in the said United States Supreme Court to be there and then held, that, the record and proceedings aforesaid be- inspected, the said United States Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Hon. Samuel F. Miller, senior associate [SEAL.] justice of the Supreme Court of the United States, this 18th day of August, in the year of our Lord one thousand eight hundred and eighty-eight, and of the Independence of the United States the one hundred and thirteenth.

L. S. B. SAWYER,
Clerk U. S. Circuit Court, Northern District of California,
By F. D. MONCKTON,
Deputy Clerk.

The above writ of error is hereby allowed.
NILES SEARLES,
Chief Justice Supreme Court, State of California.

45 [Endorsed:] United States Supreme Court. Silas Tubbs, pl'ff in error, *vs.* R. E. Wilhoit, *et al.*, ex'rs, &c., def'ts in error. Copy. Writ of error.

46 *Clerk's Certificate.*

In the Supreme Court of the State of California.

SILAS TUBBS, Plaintiff in Error,
v.
R. E. WILHOIT and R. B. THOMPSON, Executors of the Last Will and Testament of Joseph Kile, Deceased, Defendant in Error.

I, J. D. Spencer, clerk of the supreme court of the State of California, do hereby certify that the foregoing forty-three pages, num-

bered from one to forty-three, both numbers inclusive, contain a full, true, and correct transcript of the proceedings in the cause above entitled, and that the same together constitute the return to the annexed writ of error.

Witness my hand and the seal of the said supreme court this twenty-third day of August, 1888.

Seal Supreme Court of California.

J. D. SPENCER, *Clerk*,
By BEN. M. MADDOX,
Deputy Clerk.

Endorsed on cover: California supreme court. No. 771. Silas Tubbs, plaintiff in error, *vs.* R. E. Wilhoit and R. B. Thompson, executors of the estate of Joseph Kiles, deceased. Filed September 21, 1888.

Office Supreme Court U. S.
FILED.
JAN 5 1891
JAMES H. McKENNEY.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1890.

No. 450.

SILAS TUBBS, PLAINTIFF IN ERROR,

versus

WILHOIT AND THOMPSON, EXECUTORS OF KILE.

In Error to the Supreme Court of the State of California.

BRIEF FOR THE PLAINTIFF IN ERROR.

HENRY BEARD,
Attorney for Plaintiff in Error.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1890.

No. 450.

SILAS TUBBS, PLAINTIFF IN ERROR,

versus

WILHOIT AND THOMPSON, EXECUTORS OF KILE.

In Error to the Supreme Court of the State of California.

BRIEF FOR THE PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

This cause came into the Supreme Court of the United States upon a writ of error to the justices of the supreme court of the State of California, allowed August 18, 1888. The transcript was filed in this Court September 21, 1888. (Record, pp. 22–23.)

Silas Tubbs, plaintiff in error here, on the 20th January, A. D. 1880, filed his complaint against Joseph Kile, in the

nature of an ejectment, in the superior court for the county of San Joaquin, alleging seizure in fee of a tract of land in San Joaquin county described as follows:

"Commencing at the northeast corner of the south half of the southeast quarter of section eleven (11), township four (4) north, range five (5) east, of Mount Diablo base and meridian, running thence south along the section line to the southeast corner of said section eleven (11); thence west along section line about 160 rods to an old post and board fence; thence northerly along the line of said post and board fence about 80 rods to the northerly line of the south half of the southeast quarter of said section eleven (11); thence east in a direct line to the place of beginning, containing about 80 acres."

(This description brings the land within and to about the same boundaries as the tract known in the public surveys as the S. $\frac{1}{2}$ of the S. E. $\frac{1}{4}$ of section 11, t'p 4 N., R. 5 E., Mt. D. M.)

For this last-described tract the plaintiff had a patent from the United States, regularly issued upon a sale to him.

The complaint alleges unlawful ouster by the defendant on 2d February, 1875, and withholding of the premises from the plaintiff thereafter; the damages in aggregate are alleged to be six thousand dollars ($6,000). (Record, pp. 1 and 2.)

On the 14th December, 1885, the death of Kile was suggested, and his executors, R. E. Wilhoit and R. B. Thompson, were substituted as defendants (p. 2).

They filed their answer January 6, 1886, denying the ownership and possession of the plaintiff of said land or any part thereof, and admitting the possession of the premises by Kile and his executors.

They admit that Kile held possession of the premises adversely to said Tubbs on and since the 1st February, 1875.

A trial by jury having been waived, the cause was tried by the court upon testimony and documentary evidence, and

on the 7th June, 1886, judgment was rendered for the plaintiff (p. 13) on an agreed statement of facts, found in the Record on pages 4 to 12, inclusive, for possession of the premises, and for $1,706.25 damages for detention thereof from October 1, 1879, to date.

(The damages for detention were based on the value of the rents, found in finding III to have been $3.50 per acre per annum.)

Appeal was taken by the defendants to the supreme court of the State of California, and counsel of both parties stipulated that the transcript of pleadings, findings of court, and judgment of the court were properly exhibited in the record (p. 14).

The supreme court of the State, July, 1887, reversed the judgment of the superior court in this cause, and directed said court to render judgment in favor of defendants "for the land in suit and the rents and profits." (Record, p. 15.)

The opinion given on which this judgment was based is found in the Record, pages 16 to 19, inclusive, filed July 1, 1887.

The case and contentions of parties are summarized by the court as follows (Record, p. 16):

"Department Two. Filed July 1, 1887.

"TUBBS
vs.
"WILHOIT *et al.* } No. 11735.

"This is an action of ejectment.

"The plaintiff's title is founded on a patent of the United States issued on homestead entry, which entry was made on the 8th of May, 1873. On this last-named day whatever right the plaintiff had attached.

"The defendants' title rests on a patent of the State of California issued to one Joseph Kile on the 5th day of August, 1865, for the land in controversy, purchased by said Kile from the State on an application to purchase made to the proper State authorities in the month of August, 1864.

"The plaintiff claims that the land is and was dry land on the 28th of September, 1850, the date of the passage of the swamp-land act, while defendants (who are the executors of Kile) claim that it was swamp and overflowed land at the date just above mentioned, and that it was conclusively determined to be such before any right of plaintiff attached."

The case presents a Federal question in the United States Supreme Court.

The findings of the superior court of San Joaquin county in the case are printed in the Record, pp. 4 to 13, inclusive.

They show (finding 1, p. 4) that the plaintiff obtained a patent of the United States, dated October 1, 1879, duly issued and recorded by the General Land Office, for the S. ½ of the S. E. ¼ of sec. 11, t'p 4 N., R. 5 E., Mt. D. M., California, which description includes the land sued for. (Finding 1, p. 4.)

The findings are here summarized so as to present the facts in the order of their dates.

In April, 1864, a subdivisional survey of this township, No. 4 N., R. 5 W., was made and returned to the United States surveyor general for California, who indorsed his approval of the map and field-notes. (Findings Nos. 9 and 25, pp. 6 and 12.)

On this plat the line of demarcation between the swamp and overflowed land and the dry land was shown as upon the south line of section eleven, the land to the north, including all of section eleven, was represented as swamp and overflowed land, and on the 1st July, 1864, a copy of this plat was filed in the proper United States district land office at Stockton. (Finding IX, p. 7.)

1864, August.—Joseph Kile, the original defendant in this action, made application to the State of California to purchase the land in controversy as swamp and overflowed land, granted to the State by the act of Congress of the 28th September, 1850, and on the 18th August he obtained a survey

thereof by the surveyor of San Joaquin county, which included the whole of the S. E. ¼ of section eleven.

This survey was approved by the State surveyor general September 30, 1864. (Finding X, p. 7.)

1864, September 30.—The State issued to said Joseph Kile a certificate of purchase. (Finding XI, p. 8.)

1865, June 15.—The copy of the plat of the United States survey was withdrawn from the land office at Stockton by the United States surveyor general under orders of the Commissioner of the General Land Office (Finding XIII), and the same has never been returned.

1865, August 5.—A State patent was issued to Joseph Kile for a tract that includes the land sued for. (Finding XII.)

1867, May 27; also June 18.—The State surveyor general gave written notice to the register and receiver at Stockton that the State had selected and sold this land under the swamp grant. (Finding XIX.)

1868.—A transcript of the township plat of the United States survey of 1864 was supplied to the land office at Stockton (findings XIX), but by whom or for what purpose does not appear.

1869.—Finding XVIII is as follows:

"That in April, 1869, and again in February, 1870, the United States surveyor general for California, under and by the order and direction of the Land Department of the United States, investigated in regard to the swampy character of said south half of the south half of said section eleven and took evidence in relation thereto, and on such investigation and evidence said surveyor general determined that said land was not of a swampy character, but was dry land and fit for cultivation, and said surveyor general reported said investigation, evidence, and determination to the

Commissioner of the General Land Office, who approved of the same, and on the 2d day of February, 1872, decided that said land was dry and fit for cultivation."

1870, May 28.—The State surveyor general notified the Commissioner of the General Land Office that the State claimed the S. ½ of the S. ½ of sec. 11 (including the land in controversy), under section 1 of the act of Congress of July 23, 1866. (Finding XXI.)

Finding XX is as follows:

"On the 17th day of May, 1870, the United States surveyor general for California reported to the Commissioner of the General Land Office that the south half of the south half of said section eleven (11) had been adjudicated by jury and the court adversely to the claim of the State under the swamp-land act, but in fact no such adjudication has been made except as to the south half of the southwest quarter of said section eleven.

"On the 14th day of December, 1870, the Commissioner of the General Land Office instructed the said surveyor general to change the segregation line between the swamp and overflowed lands and public lands as it appeared on the plat approved June 30, 1864, by extending the said line one-fourth of a mile further north, and to make such other changes in said plat and the estimated respective areas of swamp and overflowed lands and public lands as were required to represent and show said south half of the south half of said section eleven public land and not swamp and overflowed land.

"On or about December 27, 1870, the said United States surveyor general made said required change and alteration on the plat of said township in his office and instructed the register of the United States land office at Stockton to make the same change and alteration on the plat of said township in said land office, and thereupon and in said month of December, 1870, said required change and alteration on the said plat in said register's office was made by the register of said office, whereby the said segregation line was carried one-fourth of a mile to the north of its original location and the green coloring of the said south half of the south half was

was erased and said south half of south half shown and represented to be public land and not swamp and overflowed."

Findings XXII, XXIII, and XXIV are as follows, Record, pp. 11 and 12 :

"After the said homestead commutation entry by said plaintiff, and at the instance of the said Kile, the Commissioner, on the 30th day of January, 1874, ordered a hearing for the purpose of testing the validity of said claim of the State under the first section of said act of July 23, 1866.

"Such proceedings were had under an investigation by the Land Department of the United States in pursuance of said order that the said Department, on or about July 15, 1879, adjudged and determined—

"First. That by a decision of the Commissioner on the 2d day of February, 1872, the said south half of the south half of section eleven (11) was dry and fit for cultivation.

"Second. That the State's claim to the said south half of the southeast quarter of said section eleven rested upon the alleged selection and sale as affected by the first section of the said act of July 23, 1866.

"Third. That the State's claim to confirmation under that section be overruled, because the said section had no reference to swamp-land claims and selections by the State.

"Fourth. And that patent be issued to said Tubbs (the plaintiff) upon said commuted homestead entry.

"After the issuance of said patent to the plaintiff the State of California applied to the Land Department of the United States, claiming that the State was entitled, in respect to said tract, to the benefit of the first and second clauses of section four (4) of the said act of July 23, 1866, and the provisions also of section 2479 and the first and second clauses of section 2488 of the Revised Statutes of the United States, and that said tract of land be accordingly certified over to the State, because the said tract, before the act of July 23, 1866, had been segregated and represented by the township survey and plat of the United States as swamp and overflowed, and had been segregated also by the State as swamp and overflowed by the said survey (stated in finding X hereof), conforming to the United States system of surveys made before the passage of the said act of July 23, 1866, and the passage of said provisions of the Revised Statutes and before

the said original homestead entry of the said Tubbs (the plaintiff).

"On the 15th day of January, 1883, the Commissioner of the General Land Office denied the said application, and upon the only ground, as stated in said denial, that, said tract of land having been patented to said Tubbs, the General Land Office had no authority to review the decision of the Department directing said patent to be issued to said Tubbs, and on appeal by the State from this action of the Commissioner to the Secretary of the Interior the said Secretary, on December 21, 1883, affirmed the said Commissioner's decision and dismissed the said application of the State, and upon the only ground, as stated in his decision, that all jurisdiction of the Land Department over the title ceased when it issued said patent."

On this state of facts the judgment of the San Joaquin county superior court was in favor of the plaintiff for the possession of the land, and for $1,706.25 damages for withholding, together with costs.

In the supreme court of the State this judgment was reversed and the court below was directed "to enter judgment for the land in suit and the rents and profits in favor of the defendants."

The judgment and opinion of said court are found in the Record, pages 15 to 19, inclusive.

ASSIGNMENT OF ERRORS.

I.

The supreme court of California erred, 1st, in holding that the tract in controversy was granted to the State of California by the act of Congress of 28th September, 1850.

II.

In holding that this tract was duly identified by the first clause of the 4th section of the act of Congress, approved

July 23, 1866, entitled "An act to quiet land titles in California," as a tract granted to the State.

III.

In directing a judgment in favor of defendants for the rents and profits of the land.

ARGUMENT.

The statutes of the United States relating to this case are the act of September 28, 1850, and sections 4 and 5 of the act of July 23, 1866.

These laws are quoted, as follows:

"AN ACT to enable the State of Arkansas and other States to reclaim the 'swamp lands' within their limits.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That to enable the State of Arkansas to construct the necessary levees and drains to reclaim the swamp and overflowed lands therein, the whole of those swamp and overflowed lands made unfit thereby for cultivation, which shall remain unsold at the passage of this act, shall be and the same are hereby granted to said State.

"SEC. 2. *And be it further enacted*, That it shall be the duty of the Secretary of the Interior, as soon as may be practicable after the passage of this act, to make out an accurate list and plats of the lands described, as aforesaid, and transmit the same to the Governor of the State of Arkansas, and at the request of said Governor, cause a patent to be issued to the State therefor; and on that patent the fee simple to the lands shall vest in the said State of Arkansas, subject to the disposal of the Legislature thereof: *Provided, however*, That the proceeds of said lands, whether from sale or by direct appropriation in kind, shall be applied exclusively, as far as necessary, to the purpose of reclaiming said lands by means of the levees and drains aforesaid.

"SEC. 3. *And be it further enacted*, That in making out a

list and plats of the land aforesaid, all legal subdivisions, the greater part of which is 'wet and unfit for cultivation,' shall be included in said list and plats; but when the greater part of a subdivision is not of that character, the whole of it shall be excluded therefrom.

"SEC. 4. *And be it further enacted*, That the provisions of this act be extended to and their benefits be conferred upon each of the other States of the Union in which such swamp and overflowed lands, known and designated as aforesaid, may be situated." (9 Stat., 519.)

Sections 4 and 5 of the act of Congress of 23d July, 1866, are as follows:

"SEC. 4. * * * That in all cases where township surveys have been or shall hereafter be made under authority of the United States and the plats thereof approved it shall be the duty of the Commissioner of the General Land Office to certify over to the State of California as swamp and overflowed all the lands represented as such upon such approved plats within one year from the passage of this act or within one year from the return and approval of such township plats. The Commissioner shall direct the *United States surveyor general for the State of California to examine the segregation maps and surveys of the swamp and overflowed lands made by said State*, and where he shall find *them* to conform to the *system of surveys* adopted by the United States he shall construct and *approve* township plats accordingly and forward to the General Land Office *for approval:* Provided, That in segregating large bodies of land, notoriously and obviously swamp and overflowed, it shall not be necessary to subdivide the same, but to run the exterior lines of such body of land. In case such surveys are found not to be in accordance with the *system* of United States surveys, and in such other township as no survey has been made by the United States, the Commissioner shall direct the surveyor general to make segregation surveys, upon application to said surveyor general by the Governor of said State, within one year of such application, of all the swamp and overflowed land in such townships, and to report the same to the General Land Office, representing and describing what land was swamp and overflowed under the grant, according to the best evidence he can obtain. If the authorities of said State

shall claim as swamp and overflowed any land not represented as such upon the map or in the returns of the surveyors the character of such land at the date of the grant, September twenty-eight, eighteen hundred and fifty, and the right to the same, shall be determined by testimony to be taken before the surveyor general, who shall decide the same, subject to the approval of the Commissioner of the General Land Office.

"SEC. 5. * * * That it shall be the duty of the Commissioner of the General Land Office to instruct the officers of the local land offices and the surveyor general immediately after the passage of this act to forward lists of all selections made by the State referred to in section one of this act *and lists and maps of all swamp and overflowed lands claimed by said State* or surveyed as provided in this act for final disposition and determination; which final disposition shall be made by the Commissioner of the General Land Office without delay." (14 Stat., 219–220.)

THE SWAMP GRANT OF 1850 APPLIED TO THIS CASE.

By reference to the record it will be noted that the land in contest was surveyed by the county surveyor and sold by the State of California in the years 1864 and 1865, and the State patent issued August 5, 1865, but notice of the State's claim was first given to the register at Stockton, May 27, 1867, and to the Commissioner of the General Land Office in May, 1870. The validity of the State's title primarily rests upon the grant of 1850, and there the State placed it. Her sale was made prior to the act of 1866. It does not appear that any application was made by the Governor of California or other State officer at that time for the listing of this land by the Secretary of the Interior to the State, as provided for in the second and third sections of the act of Congress of September 28, 1850.

The State did not wait a reasonable time for the Secretary of the Interior to list the swamp lands in this township, but immediately proceeded to take possession and to sell, and in

this case to sell as "swamp and overflowed land unfit for cultivation," a tract which was dry and fit for cultivation.

In so doing she cast herself upon her rights as a grantee *in presenti* of a tract by its then existing description. There were cases where, as in grants for internal improvements, school indemnity, and university purposes, the State had been given authority to select tracts in satisfaction of a grant, but not so here.

Here she took *in presenti* by an existing condition of the land, or surface of the ground, and selection could neither help nor harm her title; and she is not helped or harmed by the fact that she assumed to make a sale. She cast her case on the character of the land and failed to make it good. The Secretary of the Interior and the Commissioner of the General Land Office, to whom jurisdiction was by law given to separate the granted from the ungranted lands, decided against her.

In no manner was there delay or refusal of the United States Land Department to act under the grant of 1850, as to land in township 4 N., R. 5 E., nor was there danger that the State would lose the granted land by such delay. No, there was no trouble here. The difficulty was that the United States officers took in hand the plat of survey to execute the swamp grant of 1850, and, on investigation, decided that the land involved in this case was dry, and did not pass to the State by the grant.

The plat of the township having first been made and signed by the surveyor general, and a copy filed in the district land office July 1, 1864, it was withdrawn from said office by the United States surveyor general in June, 1865. This unusual proceeding implies the existence of sufficient cause therefor. It discredited the survey and suspended it as a public record. It could not be regarded as an approved plat.

In May and June, 1867, the State notified the United

States land officers at Stockton that she had selected and sold this land as part of the swamp-land grant.

In April, 1869, and again in February, 1870 (finding XVIII), the United States surveyor general made an investigation and took evidence in regard to the character of this land, and the result of the investigation was a decision that the land was not of a swampy character, but was dry and fit for cultivation. On the 16th December, 1870, the Commissioner of the General Land Office directed that the plat of this township, as approved June 30, 1864, be corrected, and that the S. ½ of S. ½ of section 11 be represented thereon as dry land. This was done by the United States surveyor general about the 27th December, 1870.

Whilst the report and decision of the United States surveyor general upon the previous investigation was before the Commissioner of the General Land Office, the State again preferred her claim under section 1 of the act of 1866 to the General Land Office. (Finding 21.)

But final decision of the Commissioner of the General Land Office on the investigations of 1869 and 1870 was made February 2, 1872, and the decision of the United States surveyor general was affirmed, and it was found that the land was dry and fit for cultivation.

Of these hearings evidently the State had notice, and they afforded the proper opportunity for her to prove, if she could, that the tract in controversy was swamp and overflowed land, made thereby unfit for cultivation, on the 28th September, 1850. But the proof did not sustain the State claim, and the decision was against her.

It appears to the undersigned that this action of the Land Department was properly and regularly taken to test the question, of which it had jurisdiction under the act of 28th September, 1850, section 3, whether or not the greater part of each forty-acre tract was "wet and unfit for cultivation" and should be included in or excluded from the lists of swamp lands which the Secretary of the Interior was directed to make.

It was excluded by the proper officer after fair hearings and opportunities for producing evidence and on evidence taken, and there is no proof in this record that the land was actually swamp and overflowed land.

The claim of the State under the grant of 1850, therefore, stands rejected—rejected by the officers who had the jurisdiction to make the decision—this certainly and conclusively, if the original grant is alone considered—and it was under the original grant that the State sold and patented the land to Kile before the passage of the act of 23d July, 1866.

OTHER LAWS APPLICABLE.

If we look further into the body of the land laws then applicable to California, other than the act of 1850, we find that they conferred on the Commissioner of the General Land Office authority to examine and correct the plat of a survey of a township.

Soon after the admission of the State of California into the Union Congress enacted "that all the laws of the United States not locally inapplicable shall have the same force and effect within said State of California as elsewhere in the United States." (9 Stat., 521.)

By the act of March 3, 1851 (9 Stat., 617, chap. 32), the appointment and compensation of a surveyor general were provided for.

Then, by the act approved March 3, 1853 (10 Stat., p. 244), the jurisdiction and duties of the surveyor general of that State were defined, and by section 3 he was given the same power and authority and required to perform the same duties as the surveyor general of Louisiana, except where modified by said act, and was authorized to appoint deputy surveyors. The act of 3d March, 1831 (4 Stat., p. 492, sec. 4), required the deputy surveyors to give bond and to take an oath "*truly*, faithfully, and impartially" to perform their duties.

The surveying regulations of 1855 (1 Lester's Land Laws, p. 703, *et sequeus* at p. 715) require the field-notes of surveys to be faithful in all respects—that is, they must be true.

The surveyor before beginning work took an oath "well and faithfully" to execute the duties confided to him,

By the act of July 4, 1836, "to reorganize the General Land Office" (5 Stat., p. 107, section 1), it was enacted "that from and after the passage of this act the executive duties now prescribed or which may be hereafter prescribed by law appertaining to the surveying and sale of the public lands, and also such as relate to private claims of lands and the issuing of patents for all grants of land under the authority of the Government of the United States, shall be subject to the supervision and control of the Commissioner of the General Land Office."

By section 3 of that law "a principal clerk of surveys" was provided for, who, as the returns of surveyors general were made to the Commissioner, necessarily performed his duties in the General Land Office. It was his duty to "direct and superintend the making of surveys, the *returns* thereof, and all matters relating thereto which are done through the officers of the surveyor general, and he shall perform such other duties as may be assigned to him by the Commissioner of the General Land Office."

These provisions of law were in force, unmodified by revision, and the officers provided for were in the performance of their duties when the acts of Congress drawn in question in this case became laws, and when the land in controversy was surveyed by a United States deputy surveyor in 1864, and his survey was corrected in December, 1870, and the correction upheld by the Commissioner's decision of February 7, 1872.

Under these laws it was the duty of the surveyor general to have true and correct plats and surveys made, and the duty of the Commissioner to revise his work and correct errors.

Commenting upon the laws giving jurisdiction of surveys to the General Land Office, this Court said, in 1856, in Bell *vs.* Hearne, 19 Howard's Reps., 252, at page 262:

"The Commissioner of the General Land Office exercises a general superintendence over the subordinate officers of his department, and is clothed with LIBERAL POWERS of control, to be exercised for the purposes of justice, and to prevent the consequences of *inadvertence, irregularity, mistake, and fraud* in the important and extensive operations of that officer for the disposal of the public domain."

It was said at the December term, 1861, in Magwire *vs.* Tyler, 1 Black, at page 201:

"That the General Land Office has from its first establishment, in 1812, exercised control over surveys generally, is not open to discussion at this day."

Where, as in the present case, this control is exercised to correct irregularity or fraud, it seems that the corrections made should be upheld.

There is no intimation in the act of 23d July, 1866, that any existing power of supervision of surveys lawfully existing in the General Land Office was thereby repealed, abrogated, or changed.

On the other hand, it appears that the Commissioner, and under him the surveyor general, are to perform additional duties in order to carry this law into effect. It seems to the undersigned that the duty of adjusting the swamp grant to California is by this law especially committed to the General Land Office, and when the Commissioner is engaged in his legitimate duty in securing justice and fairness between the State and the United States it has not interfered with him. In the two sections of the act of 1866 above quoted "the General Land Office" and "the Commissioner of the General Land Office" are mentioned no less than *nine times*, and their recognized jurisdiction is in and around everything that is to be done.

This law of 1866, however, contains no grant to the State of swamp lands. Such grant is by the act of 1850, and by the act of 1855 and by the other laws and regulations prescribing the forms and duties of the officers of the United States the duty remained devolving upon them to obtain a true and faithful survey of the township by which the officers could list the swamp lands according to the spirit and meaning of the swamp-land grant and that of 23d July, 1866.

The power and the duty of correcting an illegal survey of a township that had been platted and returned by the Surveyor General to the General Land Office was committed by all of these laws to the Commissioner, and the first clause of section 4 of the law of 23d July, 1866, was not intended to abridge or impair his legal duty and authority.

So the Commissioner regarded the case, and after full and fair investigation he ordered a correction of the plat of township 4 N., R. 5 E., Mount Diablo meridian, California.

The Secretary of the Interior did not call in question the legality or propriety of that action when reviewing it on the appeal of the case of Kile *vs.* Tubbs to him, as by his decision of July 15, 1879, annexed.

The intention and legitimate effect of the fifth section of the law of 23d July, 1866, is to continue and uphold the jurisdiction of the Commissioner of the General Land Office in the examination and *final determination* of all claims of the State to swamp lands that were at the date of its passage pending before the district land offices and the U. S. surveyor general, and the claim of this land was such a pending claim.

Whatever effect the approval of the surveyor general of the survey of this township made in June, 1864, may have had, it is clear that the Commissioner of the General Land Office had the legal supervision of the survey and power to overhaul and correct it. The approved plat of the United States survey of that township is the corrected plat.

In concluding this branch of the argument it is submitted that the record in this case shows that the land in contest is dry.

The adjoining eighty acres on the west, the S. ½ of the S. W. ¼, had been decided by a jury and court to be dry land. That tract was originally by the plat of 1864 represented as swamp, and when the plat was corrected, in December, 1870, the line of demarcation between swamp and dry lands was located so as to show all the S. ½ of the S. ½ of section 11 as dry land, and the marginal statement of the areas of the swamp and overflowed lands and the dry lands was corrected to correspond. (Finding XX.)

These lands are therefore now represented on the approved plat as dry lands, and the land in contest is shown to be dry land by the investigations and decisions of the surveyor general and the Commissioner of the General Land Office, and the patent of the land to the plaintiff in error is upheld by that record.

In finding VII it is stated that "Kile did not grub nor clear said land sued for, nor reclaim or protect the same from overflow by ditches or drains constructed or maintained by him, nor enclose the same, nor render it fit for cultivation, and he did not make any improvements on or of said land, and there are no improvements on or of said land made or constructed by said Joseph Kile of any value whatever to said land sued for."

Yet in finding III it is stated:

"That the value of the rents and profits of said land and premises have been ever since the said 1st day of October, 1879, three and fifty-hundredths dollars per acre per annum, and amounting in the aggregate to seventeen hundred and six and twenty-five hundredths dollars, computed from October 1st, 1879, to the date of these findings."

When no reclamation work has been done and annual rents are worth $3.50 per acre, it cannot well be claimed that the land is swamp and overflowed and unfit for cultivation.

Yet such is the contention of the defendants in error.

II.

We now reach the second important error assigned as reason for reversing the decision below.

The court held that the claim of the State to this land was determined in her favor by the first clause of the fourth section of the act of July 23, 1866.

We contend, on the contrary, that the language of that clause, construed with other land laws, does not cover this peculiar case.

It must be noticed that on the date of the passage of that act the plat of this township had been discredited. It had been withdrawn from the local office by the surveyor general for correction, as appears from the subsequent action taken. In February, 1868, a copy of this discredited plat was made and certified by the General Land Office, and *afterwards* filed in the district land office, without note or comment or instructions or reason given, so far as the record makes disclosure. The record also fails to state by whom or for what purpose this copy was filed.

It was not treated by the surveyor general or the Commissioner of the General Land Office as an obstacle to a continuance of the pending investigation into the character of the land, which afterwards terminated in the correction of the plat and the representing of this land as dry land thereon. The officers who took this course did not construe the clause under discussion as requiring them to certify to the State, under the grant of September 28, 1850, lands that were dry lands and that should have been surveyed as dry lands.

If the question had been asked on the 23d July, 1866, if the survey and plat of township 4 N., R. 5 E., Mount Diablo meridian, California, is an approved plat and survey "made under authority of the United States," the answer must have been, No; because the General Land Office was at the time

conducting investigations into the regularity and legality of that survey, and after the investigations were concluded the survey was found illegal and incorrect and was amended; or if the plat and survey were regarded as approved "under authority of the United States" the approval would be restricted to the parts only which were ultimately found correct, and not as extending to the errors.

Much importance is claimed for this state of facts in this case existing when the act of 1866 became a law.

The recognition of exceptions to general laws and general rules in the application of them is so common as to warrant the not infrequent remark that the existence of the exception proves the rule. The suspension and discredit of the plat of this township disrobes it of the habiliments of an "approved" plat. We are not advised of any formal restoration of its official status, but may assume that after correction in December, 1870, it was restored.

It is reasonable to claim that there was no intention embodied in the fourth section of the act of 1866 to make a *new and additional grant*, nor to give title to dry land under the grant of swamp land.

By section 5 of said law the jurisdiction for overhauling and correcting "lists and maps of all swamp and overflowed lands claimed by said State" of California was reserved for the final disposition to be "made by the Commissioner of the General Land Office," and as to this land the Commissioner was engaged in such duty when the act passed.

It is manifest at a glance that if the land in contest had been found to be distinctly mineral in character, containing extensive and rich mines of the precious metals; or if it had been actually within a private grant, though represented on the plat as public land; or if it had been in use and occupation by the Government for military or light-house purposes, the sale by the State would be void, even if the plat of approved public surveys represented it to be swamp land.

The first clause of section 4 of the act of July 23, 1866, has such exceptions in application, because it is to be construed as a part of the land laws of the United States, having relation to other legal and constitutional duties and powers of the Government over the public lands. The fraud or mistake of a surveyor in returning the land as swamp and overflowed when it was really dry, it was not intended by this act of 1866 to set up and establish, so that it would change and alter the intention of Congress in making the grant of swamp lands to the State in 1850.

a. We remark that as to the general intention expressed in the laws of the United States, to grant the land by its description only, there does not appear to be a different intention expressed or implied in the act of 23d July, 1866, or an intention to enlarge the original grant so that it shall include dry lands.

b. By reference also to the State laws it appears that the State of California had not authorized or sanctioned the survey or sale by her officers of any lands as swamp lands that were *not actually such on the date of the original grant.*

The patent for the S. E. ¼ of sec. 11, granted by the State to Kile (finding XII), recites the grant of 28th September, 1850, and the State laws of 21st April, 1858, 18th April, 1859, amendatory thereof, and an act of 29th April, 1861.

We submit extracts from those laws to sustain our position, to be found in—

"*The General Laws of the State of California from* 1850 *to* 1864, *Inclusive*,

"COMPILED BY

"THEODORE H. HITTELL.

"Published by Bancroft & Co.,
"San Francisco,
"1868."

In this book the laws are printed in paragraphs.

"AN ACT to provide for the sale and reclamation of the swamp and overflowed lands of this State," approved April 21, 1858.

"SECTION 1 (Par. 4081). The swamp and overflowed lands belonging to this State or that may hereafter be granted to this State by act of Congress entitled 'An act to enable the State of Arkansas and other States to reclaim the swamp lands within their limits,' passed September 28, 1850, shall be sold at the rate of one dollar per acre, in the manner prescribed by this act, and the proceeds of the sales thereof under this or any former act shall be paid into the treasury of this State as revenue, and shall be credited to the account of a swamp-land fund to be appropriated for the reclamation of said lands as the Legislature may hereafter direct," &c.

"SEC. 2 (4082). Any person who is or may be entitled by the laws of this State to become a citizen thereof, wishing to purchase land under the provisions of this act, shall file an affidavit in the office of the county surveyor of the county in which the land sought to be purchased or the larger portion thereof is situated, that he has not purchased any other land," &c., * * * "and that every forty-acre lot or its equivalent subdivision of the land sought to be purchased is the greater part swamp or swampy or subject to overflow at the planting, growing, or harvesting season, so as to endanger, injure, or destroy the crops, taking the average season for a reasonable number of years prior to the year 1850," &c. * * *

"SEC. 7 (4087). Provided that the purchaser or other person holding the certificate of purchase issued by the register of the State land office might present the same to the Governor of this State, and should the Governor find that the land or a part of the land designated in the said certificate belongs to or has been confirmed to the State," &c., &c., * * *

"he shall issue a patent for said land or said part of said land' to the present owner of the certificate: * * * "*Provided*, That neither the patent provided for in this section nor the certificate provided for in the sixth section of this act shall have any other legal effect or force than as a quit-claim of all right, title, and interest on the part of the State."

By these laws it appears that the State intended to sell only those lands which belonged to her under the grant by the United States.

"An act for the relief of purchasers of lands from the State of California," approved April 8, 1859, is in the same line of meaning and intention:

"SEC. 3 (4100). When parties have purchased lands from the State supposing them to be the property of the State, and said lands shall be found to be the property of private individuals or of the General Government, the said register shall allow other lands belonging to the State of a similar character to be taken in lieu thereof and give title for the same."

The legislative act of April 29, 1861, found in paragraph 4114, and which is referred to in the patent given to Joseph Kile by the State, does not seem to have any important bearing, and the same is true of the legislative act of 27th April, 1863, which is also referred to.

The act of the Legislature approved May 13, 1861, entitled "An act to provide for the reclamation and segregation of swamp and overflowed and salt-marsh and tide lands donated to the State of California by act of Congress" contains many pertinent provisions to show that California was aiming by its laws only to set apart the swamp land granted to her.

It established a board of commissioners to supervise the expenditure of moneys for reclamation of swamp lands and to collect maps, statistics, &c.

By section 19 (4133) it was enacted that—

"ART. 4133, SEC. 19. The county surveyors of the several counties of this State shall, immediately after the organization of the board of commissioners, proceed to segregate the swamp and overflowed lands within their respective counties, from the high lands in said counties, and make complete maps of all the swamp and overflowed lands within their respective counties, in legal subdivisions of sections and parts of sections, together with a tabular statement of all such lands as have been sold by the State, and under what act the same were sold, of all lands claimed and by whom claimed, and as nearly as possible by what title the same are held, and file the said tabular statement in the county recorder's office of their respective counties; also, transmit duplicates of said maps to the surveyor general of the State: *Provided, however*, That it shall be discretionary with the board of commissioners whether land already surveyed and segregated under any former act for the sale and reclamation of swamp and overflowed lands shall be re-segregated or surveyed under this act: *And provided further*, That they shall determine whether the segregation may be made by a complete survey of all such swamp and overflowed lands into sections, or by running the line of division between the swamp and United States land, and make said maps from said survey. It shall further be the duty of the county surveyors to procure such testimony, to be taken before a notary public, or any officer authorized by law to administer oaths, as they shall be able to procure, that all of such lands that are embraced within the said survey and exhibited on the map are swamp and overflowed lands; and in all cases where any of the said lands have been returned as United States lands, whether sold or unsold, they shall state that fact, and procure all the evidence that they may deem sufficient to substantiate the fact that such lands are swamp and overflowed lands, and transmit the same to the surveyor general of the State. As soon as practicable after the passage of this act, the board of commissioners shall send a copy thereof, with instructions thereupon, to the county surveyors of all the counties in the State, *with blank affidavits in the form required by the Commissioner of the General Land Office, at Washington.*"

Sections 20 and 21 (paragraphs 4134 and 4135) regulate

the compilation and preservation of maps and schedules of swamp lands.

Section 22 is as follows:

"ART. 4136, SEC. 22. One of the copies of the general map to be compiled and made by the surveyor general, with the schedule of the swamp and overflowed lands so claimed, and the affidavits required by this act, shall be by him transmitted to the Governor, and by the Governor forwarded to the proper department of the General Government, at Washington, as an exhibit of the lands which the State claims under the act of Congress of September 28, 1850, and request the department to certify said land to the State of California."

JUDICIAL DECISIONS CONSIDERED.

The decision of this Court in Wright *vs.* Roseberry (121 U. S. Rep., 488) is cited by the supreme court of California as its sole authority for its decision in this case.

That court, in earlier cases, notably in Wright *vs.* Roseberry (63 Cala., 252), had held that an action could not be maintained to recover lands granted to the State as swamp and overflowed lands, and which had been surveyed by her as such, unless the lands had been certified or patented to the State by the Commissioner of the General Land Office.

This doctrine on writ of error was modified by this Court.

At the foundation of its judgment of reversal it laid down the proposition that the swamp grant was a grant *in presenti* to an existing grantee by a sufficient description in the grant.

Next, that after the segregation of the granted lands by State officers and the adoption of those surveys by the surveyor general and the Commissioner of the General Land Office, the grantee of the State might maintain an action, though the Commissioner of the General Land Office did neglect or refuse to certify or to patent the lands to the State.

Here we claim that the underlying principle in Wright *vs.* Roseberry upholds the contention of this plaintiff that

the grant was one *in presenti*—by a description—but it did not purport to convey lands of a different description.

After a full review of prior decisions of this Court, the learned justice announing the decision said (p. 509):

"The result of these decisions is that the grant of 1850 is one *in presenti*, passing the title to the lands as of its date, but requiring identification of the lands to render the title perfect; that the action of the Secretary in identifying them is conclusive against collateral attack, as the judgment of a special tribunal to which the determination of the matter is intrusted; but when that officer has neglected or failed to make the identification it is competent for the grantees of the State, to prevent their rights from being defeated, to identify the lands in any other appropriate mode which will effect that object."

As stated above, the State of California in this case proceeded to claim this land in 1864, immediately after its survey by the United States, before the Secretary of the Interior began or had had sufficient time to perform the duty of listing the swamp lands in the township. What lands he listed, and when listed, the record does not disclose.

When, in 1867, the State notified the register of the United States Land Office at Stockton (Finding XIV) that she had sold the tract now in contest as part of the grant of swamp and overflowed land, the United States Land Department appears to have been engaged in investigating and correcting the surveys in this township, the investigations resulting in the correction of the plat in December, 1870, and the final decision of the Commissioner of the General Land Office of February, 1872, affirming the finding of the United States surveyor general that this land was not swamp and overflowed on the 28th September, 1850. (Finding XXII.)

As it appears to the undersigned, *another claim* was presented on the 28th May, 1870, by the State surveyor general to the Commissioner of the General Land Office, under section 1 of the act of Congress of July 23, 1866, and in May,

1873, the plaintiff in error, Tubbs, made his homestead entry, the land at that date being exhibited on the official plat of survey on file in the district land office as dry land subject to homestead entry. (Findings XVI and XXI.)

A new and further hearing was, at the instance of Kile, thereupon ordered by the Commissioner in January, 1874, expressly to test the claim of the State under the first section of the act of 1866; and a decision of the Land Office having been made therein, the case came before the Secretary of the Interior on appeal of both parties, and the Secretary, July 15, 1879, rendered his decision, as stated in finding XXII.

It appears to the undersigned to be but just and fair to the Secretary to present his own views of the case, especially as the findings concerning his decision are somewhat obscure, and I respectfully annex to this brief a copy of that decision, as printed in Copps' Land Owner, vol. VI, p. 108.

We have thus progressed in this matter to the end of the two cases made by the State to the Land Department. In the first it was found that the tract in contest was not swamp, and overflowed, and thereby rendered unfit for cultivation but was dry and not granted by the act of Congress of 28th September, 1850.

In the second, it was decided that the *sale* by the State had not been confirmed by the act of Congress of July 23, 1866, section 1. There is nothing in the findings of the record in the case at bar that conflicts with these decisions.

The State, however, sets out a third basis of claim in findings XXIII and XXIV, and claims that the survey by the county surveyor of 160 acres (viz., the S. E. ¼ of section 11) in 1864 is a confirmation of the land so surveyed to the State without further proceedings.

The findings advise us that when this was presented to the General Land Office and the Department of the Interior it was not sanctioned, the Secretary stating that after the issuing of the patent to Tubbs the Department's jurisdiction over the land had ceased.

The reason thus given for non-action was a good one, but was not the only good one.

The second clause of the 4th section of the act of 23rd July, 1866, deals with *township plats* and not surveys of isolated quarter sections.

The law in this clause deals with "segregation maps and surveys of the *swamp and overflowed lands* made by said State."

It refers to *maps then in existence* and which had been made under the legislative act of May 13, 1861, which has been quoted.

The record in this case does not show that any such map of this township had been made, or that the land in contest was exhibited thereon as swamp and overflowed, and these facts cannot be here positively assumed.

We know by inspection that the survey No. 958, as shown in finding X, is made up from the plats of the United States survey. It starts from the common corner of sections 11, 12, 13, and 14, and exhibits a square tract 40 chains on each side.

The plat of it cannot be called a segregation map made by the State; it does not show from what land the quarter section is thereby segregated.

From what we know historically, we would infer that in this township, situated near the centers of trade then existing, as in other townships similarly situated, the segregation surveys and plats of the State had been completed under the legislative act of May, 1861, long before the county surveyor made a plat of the quarter section for Mr. Kile.

[In the Secretary's decision (*post*) it is stated that such plat had been made, but the land now in contest had *not* been segregated by the State on that plat. This, it is believed, is historically true.]

The case of Heath *vs.* Wallace (71 California Reports, p.

50) supports the contention that a separate plat and survey of 150 acres made by a county surveyor, in 1865, and approved by the State surveyor general, is not the segregation map and survey referred to in the second clause of section 4 of the act of Congress of 23d July, 1866, and as the land in contest in that case had been found by the Secretary of the Interior, upon testimony taken by the United States surveyor general, *to be dry and fit for cultivation*, the State patent issued April 21, 1876, for the land as swamp and overflowed, was held to be void. A sale by the United States to a pre-emptor based on a settlement made July 24, 1876, was therefore upheld.

So far as exhibited in this record, it is not shown that the Secretary of the Interior or his subordinate, the United States surveyor general, was under obligation, on seeing a copy of the San Joaquin county survey No. 958, to re-examine and correct the township plat of the United States surveys and represent the S. E. ¼ of section 11 as swamp land, when, after long contest and many hearings, the Secretary and all his subordinates had decided that the land was dry and fit for cultivation on the 28th September, 1850.

Moreover, the Secretary's refusal to entertain the last application was practically the refusal of an application for a reconsideration, or in strictness a refusal to entertain a new suit in respect to the same subject-matter that had before been litigated and decided.

In one of the former suits the State claimed the land under section one, and might have also made a claim under section 4 of the act of 1866. The subject-matter was the same and the parties were the same. Hence the former decision was binding and final.

Aurora *vs.* West, 7 Wallace, 82.
Stocking *vs.* Ford, 18 Howard, 418.
Tioga R. R. Co. *vs.* Blossburg Co., 20 Wallace, 137.
Jordan *vs.* Van Eppes, 85 New York, 427.
Thompson *vs.* Roberts, 24 Howard, 233.

In the decision in Wright *vs.* Roseberry it is said (p. 517):

"There was no suggestion by either the Commissioner or the Secretary that the lands were not swamp and overflowed as designated upon the township plat.

"The question, therefore, is whether upon the proof thus presented of the segregation of the lands in controversy as swamp and overflowed lands by the authorities of the State of California, and their designation as such lands on a plat of the township made by the surveyor general of the United States, and approved by him, and forwarded to the General Land Office, pursuant to the fourth section of the act of 1866, and approved by the Commissioner, as shown by its official use, the plaintiff can maintain an action for the recovery of the lands, they never having been certified over to the State, as required by § 2488 of the Revised Statutes, or patented to her under the act of 1850. According to the decisions we have cited, the holders of the certificates of purchase had a good title to the lands if in fact they were swamp and overflowed lands on the 28th of September, 1850."

This Court has thus reserved the question of the present case, whether a sale by the State of land in 1864 has passed to the purchaser a valid title, though the land was not swamp and overflowed and unfit for cultivation on the 28th September, 1850.

In the closing paragraph of the decision (p. 521) this Court say in that case:

"For the error in holding that the certificate of the Commissioner was necessary to pass the title of the demanded premises to the State, the case must go back for a new trial, when the parties will be at liberty to show whether or not the lands in controversy were in fact swamp and overflowed on the day that the swamp-land act of 1850 took effect. If they are proved to have been such lands at that date, they were not afterwards subject to preëmption by settlers. They were not afterwards public lands at the disposal of the United States. Parties settling upon such lands must be deemed to have done so with notice of the title of the State, and after the segregation map was deposited with the surveyor general

of the State, with notice also that they were actually segregated and claimed by the State as such lands.

"*Judgment reversed and cause remanded for further proceedings not inconsistent with this opinion.*"

In this case now at issue the record shows that the question whether the land was or was not swamp and overflowed has been repeatedly tried and invariably decided by the officers of the Land Department having primary jurisdiction, both under the swamp grant of 1850 and under the laws regulating surveys, adversely to the State, and for that reason, and because the record in this case shows that the land has always been dry (though direct testimony was not taken in the court of original jurisdiction upon that point), the plaintiff in error claims a reversal of the decision of the Supreme Court of the State of California.

III.

As to the error thirdly assigned above, it will be noticed (Record, p. 15) that the judgment of the supreme court of the State is that the judgment of the county court be "reversed and the cause remanded, with directions to the court below to enter judgment for the land in suit and the rents and profits in favor of the defendants."

The order for judgment for the rents and profits appears to be an inadvertence. The defendants and their decedent were in possession of the rents and profits, and the plaintiff did not get them.

A judgment in favor of the defendants seems to be all that was proper.

Respectfully submitted,

HENRY BEARD,
Attorney for Plaintiff in Error.

APPENDIX.

PRE-EMPTION.

KILE *et al. vs.* TUBBS.

Section 1 of the act of Congress of July 23, 1866, has no reference to swamp lands, but merely confirms sales under selections made in part satisfaction of grants to the State of California, of which the swamp grant is not one. The 4th section alone of said act refers to swamp lands.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., *July* 15, 1879.

SIR: I have examined the case of State of California *ex rel.* Joseph Kile and R. B. Thompson *vs.* Silas Tubbs, involving title to the S. ½ of S. E. ¼ and S. ½ of S. W. ¼ section 11, 4 N. 5 E. Mt. Diablo meridian, Stockton district, California, on appeal from your decision of August 7, 1876.

Tubbs claims the former tract under cash entry No. 5366, commuted Nov. 18, 1873, from homestead entry No. 1696, made May 8, 1873, and the latter tract under cash entry No. 5178, dated May 7, 1873, based upon claim of pre-emption settlement in 1862.

The State claim is preferred under section one of the act of July 23, 1866, based upon sale of the S. E. ¼ to Joseph Kile, September 30, 1864, and State patent to same, August 15, 1865, and of the S. W. ¼ to John Thompson, November 17, 1860, and State patent to Joseph Kile and R. B. Thompson, assignees, June 26, 1862, as part of the swamp grant of September 28, 1850. The regular segregation maps of the State exclude these tracts from the swamp lands. The original U. S. plat of the township, filed July 1, 1864, represented the land to be swamp; but upon complaint of settlers and allegations of improper conduct on the part of the deputy surveyor, your office, on the 10th day of May, 1865, ordered the suspension of the plat, and after full investigation and

several hearings, in which the State claimants participated, the land was shown to be dry and fit for cultivation, the improper conduct of the deputy was considered proved, and the plat was corrected so as to exclude the tract from the swamp land designation.

The tract lies along the line of the Central Pacific railroad, but is excluded from the grant by the decision in Newhall *vs.* Sanger, as a part of the rancho Los Moquelamos.

All these questions have become *res adjudicata* upon the records of your office, and the State claim now rests solely upon the alleged selection and sale, as affected by the first section of the act of 1866.

You found the evidences of the sale satisfactory, and held that she was entitled to a certification of the lands, unless a superior right be found in Tubbs by reason of his pre-emption claim, as recognized in the act making confirmation.

Upon the evidence you decided that he had a valid pre-emption right to the S. ½ of the S. W. ¼, and awarded that tract to him under his proof and entry. His claim as a homestead upon the S. ½ of S. E. ¼ you rejected as initiated subsequent to the act of 1866, and awarded the land to the State. Both parties appeal from so much of the decision as lies against their respective claims.

Your findings of fact and the award made by you, are in accordance with former rulings and decisions, and, were I satisfied with the construction heretofore placed upon the statute of 1866, I should affirm your decision. But a careful examination of the first section of the act convinces me that it has no reference to swamp claims, its manifest office being to confirm sales under selections made in part satisfaction of grants to the State, requiring for such satisfaction the selection of lands from the public domain by the authorities of such State duly appointed under her laws for that duty.

The swamp grant of 1850 is not of such class; and the act of 1866, by its fourth section, made full provision for the confirmation of all swamp land claims which Congress thought proper to recognize. This section is complete in itself, points directly to the subject matter of the swamp grant, and its provisions are exceptionally liberal in aid of every variety of claim which it is conceived can be presented by the State or her purchasers. This being so, the scope of the act relating to swamp lands must be looked for in this

fourth section, leaving the first section to its legitimate operation upon lands subject to selection under the grants to be satisfied by such selection, without intermingling the necessarily variant and incongruous provisions pertaining to each.

This view has been judicially declared by the supreme court of the State in the case of Sutton *vs.* Fassett, 51 California, 12; and as the grantee has thus through her own highest court construed the act passed for her benefit, it is perfectly fair for this department in administering upon her claim to adopt the same construction, especially when so clearly and reasonably supported by the language of the law itself.

I therefore affirm so much of your decision as recognizes the pre-emption entry of Tubbs upon the S. ½ of the S. W. ¼, and reverse the ruling in respect to the right of the State—thus leaving intact the commuted homestead entry upon the S. ½ of the S. E. ¼ also, and direct that patent issue to Tubbs upon both.

The papers accompanying your letter of January 20, 1877, are returned.

Very respectfully, C. SCHURZ, *Secretary.*

Commissioner General Land Office.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1890.

No. 450.

SILAS TUBBS,

PLAINTIFF IN ERROR,

VS.

WILHOIT AND THOMPSON,

EXECUTORS OF KILE.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

BRIEF FOR THE DEFENDANTS IN ERROR.

A. T. BRITTON,
A. B. BROWNE,
Attorneys for Defendant in Error.

In the Supreme Court of the United States.

OCTOBER TERM, 1890.

No. 450.

SILAS TUBBS, *Plaintiff in Error*,
vs.
WILHOIT AND THOMPSON, *Executors of Kile.*

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

BRIEF FOR THE DEFENDANTS IN ERROR.

This was an action of ejectment brought in 1880 by Tubbs in the Superior Court for the County of San Joaquin, California, to recover from Kile possession of eighty acres of land, substantially known as the S. ½ S.E. ¼ of section 11, Tp. 4 N., R. 5 E., Mt. D. M. That court rendered judgment for the plaintiff; but upon appeal, the Supreme Court of the State, in July, 1887, reversed that judgment, and directed the court below to enter judgment for the land "in suit and the rents and profits in favor of the defendants."

STATEMENT.

I.

An act of Congress approved September 28, 1850, (Stat. at Large 9, p. 519,) to enable certain States, including Cali-

fornia, to "construct the necessary levees and drains to "reclaim the swamp and overflowed lands therein," made a present grant of all such then unsold lands to said States.

By section 2 of said act the duty of identifying the lands so granted was imposed upon the Secretary of the Interior; who was directed to furnish the Governors of said States with accurate lists and plats of such lands, and to issue patents therefor.

And by section 3 it was prescribed that in making out such lists and plats "all legal subdivisions, the greater "part of which is wet and unfit for cultivation, shall be in- "cluded in said lists and plats; but when the greater part "of a subdivision is not of that character, the whole of it "shall be excluded therefrom."

II.

The subdivisional survey of township four (4) north of range five (5), east Mt. D. M., was made by the United States, in April, 1864; the plat thereof, together with the field and descriptive notes, were examined and approved, and the approval duly certified by the U. S. Surveyor General for the State of California; and a duly certified copy of said approved map or plat was filed by the said Surveyor General, on July 1, 1864, in the United States district land office at Stockton, California, within which district said township was then situate. (Finding IX.)

Another copy of said plat was filed with the Commissioner of the General Land Office, and a third was retained in the office of said Surveyor General. (Finding XIX.)

These so-called copies were, in fact, triplicate originals, of which that one retained in the Surveyor General's office is denominated the "record." Sec. 2223, subdiv. 4th, U. S. Rev. Stats., requires that the Surveyor General "shall trans- "mit to the registers of the respective land offices within "his district general and particular plats of all lands sur-

"veyed by him for each land district; and he shall forward "copies of such plats to the Commissioner of the General "Land Office."

And Sec. 2395, subdiv. 8th, R. S., further provides that:

"These field books shall be returned to the Surveyor "General, who shall cause therefrom a description of the "whole lands surveyed to be made out and transmitted to "the officers who may superintend the sales. He shall also "cause a fair plat to be made of the townships and frac- "tional parts of townships contained in the lands, describ- "ing the subdivisions thereof and the marks of the corners. "This plat shall be recorded in books to be kept for that "purpose; and a copy thereof shall be kept open at the "Surveyor General's office for public information, and "other copies shall be sent to the places of the sale, and to "the General Land Office."

III.

The greater part of the lands upon said approved township plat, including all of section 11, was colored green, and across the face of such green parts the words "swamp and "overflowed land" were written; said lands, so colored and marked, were excluded from the estimated area of "public lands," and included in the estimated aggregate area of "swamp and overflowed land," as appears by the marginal table of acres forming a part of said plat; and said colored and marked lands were represented as swamp and overflowed lands by both the field and by the descriptive notes of the said survey. (Finding IX.)

IV.

In August, 1864, Joseph Kile made application to the State of California to purchase the tract here in controversy as swamp and overflowed lands enuring to the State under the grant of Congress of September 28, 1850. The county surveyor thereupon made and recorded a plat and field

notes of said tract as being "swamp and overflowed," and upon September 30, 1864, said plat and field notes were approved of record by the State Surveyor General. (Finding X.) The same day, the State issued to Kile a certificate of purchase for the tract here in suit, under her laws for the sale of swamp and overflowed lands (Finding XI), and upon August 5, 1865, the patent of the State was duly issued and delivered to said Kile. Said patent set forth that all the requirements of the act of Congress, as well as the act of the State Legislature, in relation to swamp and overflowed lands had been complied with. (Finding XII.)

V.

On or about June 15, 1865, the said township plat was withdrawn from the Stockton land office by order of the Commissioner of the General Land Office (Finding XIII), and on or about February, 1868, there was filed in the Stockton land office another copy of said plat, corresponding in *all* particulars with the original plat, except that its correctness as a true copy was additionally certified by *both* the Commissioner of the General Land Office and by the United States Surveyor General for California. (Finding XIX.)

VI.

At the time, then, of Kile's application to purchase from the State the tract here in suit as swamp and overflowed land, and at the time when the State survey was made and approved of record both by the county surveyor and by the State Surveyor General, and at the time when Kile completed his payment of purchase money to the State and received his certificate of purchase, the official records of the State of California and of the United States concurred in all respects in certifying the lands in suit to be swamp

and overflowed lands, properly enuring to the State under the grant of September 28, 1850.

That condition of affairs remained undisturbed at the date of issue of the State patent, on August 5, 1865, and at the date of the passage of the act of Congress, approved July 23, 1866 (Stat. at Large, 14, p. 218), except that said township plat had been suspended in said Stockton Land Office on or about June 15, 1865. (Finding XIII.)

VII.

An Act of Congress, approved July 23, 1866 (Stat. at Large, 14, p. 218), entitled "An Act to quiet land titles in "California," confirmed to that State various classes of selections of land, and Section 4 of said act provided in its first paragraph as to lands claimed to enure to the State as swamp and overflowed:

"That in all cases where township surveys have been or "shall hereafter be made under authority of the United "States, and the plats thereof approved, it shall be the duty "of the Commissioner of the General Land Office to certify "over to the State of California, as swamp and overflowed, "all the lands represented as such, upon such approved "plats, within one year from the passage of this act, or "within one year from the return and approval of such "township plats."

And in its second paragraph it provided that:

"The Commissioner shall direct the United States Sur- "veyor General for the State of California to examine the "segregation maps and surveys of the swamp and over- "flowed lands made by said State; and where he shall find "them to conform to the system of surveys adopted by the "United States, he shall construct and approve township "plats accordingly, and forward to the General Land Office "for approval."

VIII.

On May 27, 1867, and again on June 18, 1867, the State Surveyor General gave written notice to the U. S. Land Register at Stockton, that the State had selected and sold the land here in controversy (Finding XIV), and such notice was repeated upon May 28, 1870 (Finding XXI).

IX.

In April, 1869, and in February, 1870, the U. S. Surveyor General for California investigated in regard to the swampy character of the S. ½ S.E. ¼, here in suit, together with the other alleged swamp lands in the same township; and May 17, 1870, he reported to the Commissioner of the General Land Office that, in his opinion, the entire S. ½ of the S. ½ of said section 11 *was* dry land and fit for cultivation. (Finding XVIII.) It should be observed that this report simply touched the character of the land *at that time*, and did not in anywise deal with its condition at any anterior date.

In the same report, the Surveyor General reported to the Commissioner that the south half of the south half of said section 11 had been adjudicated by jury and the court adversely to the claim of the State under the swamp grant; *but in fact such adjudication affected only the S. ½ of the S. W. ¼, and no such adjudication had been made as to the S. ½ S.E. ¼, here in suit.* (Finding XX.)

X.

Thereupon on December 14, 1870, the Commissioner of the General Land Office ordered the Surveyor General to make such changes upon said township plat as would represent said south half of the south half of section 11, to be public land, and not swamp and overflowed.

No instructions were given to change in any respect the field or descriptive notes of said survey.

Said order of the Commissioner was duly executed on December 27, 1870 (Finding XX), *although the said Commissioner never rendered his decision as to the character of said subdivisions until February* 2, 1872. (Finding XXII.)

XI.

Until "May 8, 1873, no claim, filing or entry to or upon "the said south half of the southeast quarter of said section "eleven for pre-emption, homestead or other purposes under "the laws of the United States, was presented or made mat- "ter of record, and no rights of pre-emption or homestead "settlers or claimants had attached to said premises." (Finding XV.)

XII.

Silas Tubbs, the plaintiff in error herein, having on the previous day made final proof and pre-emption entry upon the south half of the south*west* quarter of said section eleven, thereupon, on May 8, 1873, made an original homestead entry of the south half of the south*east* quarter of said section eleven, the tract here in suit. Upon November 18, 1873, he commuted said homestead entry to a cash entry (Finding XVI), and patent therefor was issued to him by the United States on October 1, 1879 (Finding I.)

XIII.

"After the issue of said patent to Tubbs, the State of "California applied to the Land Department of the United "States, claiming that the State was entitled, in respect to "said tract, to the benefit of the first and second clauses of "section four (4) of the said act of July 23, 1866, and the "provisions also of section 2479, and the first and second "clauses of section 2488 of the Revised Statutes of the

"United States, and that said tract of land be accordingly "certified over to the State, because the said tract, before the "act of July 23, 1866, had been segregated and represented "by the township survey and plat of the United States as "swamp and overflowed, and had been segregated also by the "State as swamp and overflowed by the said survey (stated "in Finding X hereof), conforming to the United States "system of surveys made before the passage of the said act "of July 23, 1866, and the passage of said provisions of the "Revised Statutes, and before the said original homestead "entry of the said Tubbs (the plaintiff)." (Finding XXIII.)

XIV.

"On the 15th day of January, 1883, the Commissioner of "the General Land Office denied the said application, *and* "*upon the only ground*, as stated in said denial, that said "tract of land having been patented to said Tubbs, the "General Land Office had no authority to review the "decision of the Department directing said patent to be "issued to said Tubbs, and on appeal by the State from "this action of the Commissioner to the Secretary of the "Interior, the said Secretary, on December 21, 1883, "affirmed the said Commissioner's decision and dismissed "the said application of the State, and *upon the only ground*, "as stated in his decision, that all jurisdiction of the Land "Department over the title ceased when it issued said pat-"ent." (Finding XXIV.)

ARGUMENT.

I.

The Swamp Grant of 1850 was a present grant to the State of all lands of the character described, lacking only identification to make same perfect as to particular tracts. That doctrine has been so repeatedly settled by this Court as to make citation of authorites unnecessary.

The duty of identification having been imposed upon the Secretary of the Interior (Sec. 2, act 1850), that officer extended to the several States the option of having their

grant identified by the field notes and plats of the United States surveys, or by parol evidence (Lester, p. 543). Some of the States accepted one method, and some accepted the other. California accepted the method by parol evidence. It proved, however, in actual practice, that the Secretary of the Interior frequently ignored the agreed methods of proof, or that the Secretary neglected to make out lists and plats and to transmit them to the Governors of the States as required by law; or still more frequently, that an ascertainment of the grant was defeated or postponed indefinitely by the failure of the United States to make the township and subdivisional surveys. The topography of California in its general features was marked by long valleys extending northerly and southerly between rugged chains of mountains, and through which valleys the various water courses of the State found their way to the Pacific ocean. In these valleys were situate the most fertile lands, large portions of which were rendered unfit for cultivation by the periodical overflow of said rivers, unless reclaimed by suitable embankments and ditches; and as the lines of settlement in the State first followed these rivers and valleys, the work of reclaiming these swamp lands was rapidly undertaken, and the State was flooded with numerous applications to purchase. Owing in many cases to the failure of the United States by surveys to make possible the usual modes of identification, and owing in other cases to the vexatious controversies authorized by the Land Department of the United States against the results of the agreed modes of identification, and owing in most cases to the entire failure of the Secretary of the Interior to perform the duty of identification imposed upon him by law, it naturally followed that the State made her own segregation maps and sold and patented lands shown to be swamp and overflowed by her own identification (Wright *vs.* Roseberry, 121 U. S., 511). The inevitable result was such confusion of titles and such conflict of authority as to seriously imperil the growth and prosperity of the State.

This condition of affairs having been carefully considered by Congress, the act of July 23, 1866, *supra*, was enacted as a statute of repose. Its avowed object was "to quiet land "titles in California." It undertook by its fourth section to prescribe new rules or methods of identification which should supersede all prior methods or rules, and which should in a summary way lead to the speedy and final adjustment of all claims under the Swamp Grant in California. It enacted—

1st. That in all cases where lands had been or should be represented as swamp and overflowed upon the approved plats of the United States surveys, it should be the duty of the Commissioner of the General Land Office to certify all such lands over to the State of California "within one year "from the passage of this act, or within one year from the "return and approval of such township plats."

2d. If the United States surveys did not show lands to be swamp and overflowed which were so shown upon the State surveys, and which State surveys conformed to the system of United States surveys, it was made the duty of the aforesaid Commissioner to direct the U. S. Surveyor General to construct and approve, and to forward to the General Land Office for approval township plats in accordance with the segregation maps and surveys of the swamp and overflowed lands made by the State.

3d. In case such State surveys were not in accordance with the system of United States surveys, and "in such "other townships as no survey has been made by the "United States," the said Commissioner was to direct the Surveyor General to make and to report segregation surveys, upon application to the Governor of the State, within one year of such application, of all the swamp and overflowed land in such townships, according to the best evidence he could obtain.

4th. And, finally, if the State should claim as swamp and overflowed any land not shown upon said aforesaid maps or returns of surveyors, then the character of such lands at the

date of the 1850 grant, and the right of the State thereto, was to be determined by testimony to be taken before, and to be decided by, the Surveyor General, subject to the approval of the Commissioner of the General Land Office.

These four methods exhausted the entire subject-matter. The last two required the continued exercise of judgment and discretion by the Commissioner. The first two left no room for the exercise of discretion, but made it the ministerial duty of the Commissioner to act in a prescribed way and within a fixed time. The statute itself fixed conditions upon which, by way of confirmation, the title to certain lands should vest in the State. It is contended that the findings show the land here in suit to have been surveyed by the United States in 1864; that the township plat was duly approved, and that said land was represented thereon as swamp and overflowed. Assuming that contention to be true, the first clause of section 4 of the act of July 23, 1866, vested in the State the title to said tract, and made it the ministerial duty of the Commissioner to give the State within one year the usual evidence of such title. It did not authorize a further enquiry as to the correctness of the representation upon the approved plat. The power to make such an enquiry would have rendered this provision of the law entirely nugatory, because it would have left the identification precisely where it stood prior to the enactment of this remedial law, viz., matter of parol evidence and decision by the Commissioner. On the contrary, the first two clauses of said fourth section prescribe methods of identification which shall supersede all other methods, and which shall be conclusive against the United States, by immediately vesting the title in the State. This is made entirely clear, because in contradistinction thereto the last two clauses of said section four specifically provide as to other classes methods of identification by further evidence and decision. This is in exact accordance with the ruling of this Court in Wright *vs.* Roseberry, *supra*, wherein it was held that by the act of July 23, 1866—

"Congress changed the provisions of law for the identifi-
"cation of swamp and overflowed lands in that State. It
"no longer left their identification to the Secretary of the
"Interior, but provided for such identification by the joint
"action of the State and Federal authorities."

II.

Nor could the failure of the Commissioner of the General Land Office to perform the ministerial duty imposed upon him by the act of 1866 in anywise limit or forfeit the title of the State. No obligation or duty was created by the first and second clauses of section 4 of that statute, which demanded of the State any further action whatever. The right of the State rested upon the *fact* of the representation upon the plat and field notes of the United States surveys, or upon the fact of segregation by the State in accordance with the system of United States surveys. The land having been thus identified, the State takes the benefit of the grant without certification by the Commissioner.

Wright *vs.* Roseberry, *supra.*

Stockton *vs.* Williams, 1 Doug. (Mich.), 546.

The case falls within the well-established principle that
"that which ought to have been done is to be regarded as
"done in favor of him to whom and against him from whom
"performance is due."

As was said by this Court in Glasgow *et al. vs.* Hortig *et al.*, 1 Bl., 602, in speaking of the failure of the Surveyor-General of Missouri to perform a ministerial duty,

"It was purely a ministerial function. His neglect could
"not suspend the vesting of the titles granted, much less
"his blunders forfeit them."

III.

Assuming, however, the correctness of the foregoing propositions, appellant argues that an exception is created by the facts of the case at bar.

1st. Because the Land Department, as counsel assert, decided as matter of fact, upon proofs taken in 1870 in a series of decisions, that the tract in suit *was* dry land and was *not* swamp and overflowed land.

2d. Because the plat was suspended on June 15, 1865, and was not restored until December, 1870, and then after expunging the representation upon the face of the plat as to the swamp and overflowed character of the eighty acres here in suit.

We briefly discuss these two claims in above order of statement.

1st. To fortify his construction of the record counsel prints copy of the decision of the Secretary of the Interior of July 15, 1879. But in perfect fairness he should also have printed the decisions below of the Surveyor General and of the Commissioner which, so far as concerned character of land upon evidence taken, were erroneously recited by the Secretary as mere matter of *statement* and not of *decision*. The sole question before the Secretary was whether the swamp grant to the State fell within the confirmation of the first (1) section of the act of 1866. He had nothing to do with character of land as matter of fact. It came into his decision as mere matter of recital or statement, and it was stated erroneously. To supplement the appendix of counsel, we annex hereto copies of the Report of the U. S. Surveyor General of California of May 17, 1870; of the order of the Commissioner of December 14, 1870, directing the Surveyor General to suspend the plat; and of the final decision of the Commissioner of February 27, 1872, being the several orders and decisions mentioned in Finding XX. We have filed duly certified copies thereof with the Clerk of the Court.

It will appear therefrom that whilst the Surveyor General made his report as to the condition of the land at the time of his personal inspection in 1870, and not as to its character on September 28, 1850, yet that he sustained the general correctness of the 1864 survey of township 4 N. 5 E; and that, whilst stating the facts of his observation, which clearly

showed the S. ½ S.E. ¼ of sec. 11 to be then protected by levees from being entirely overflowed, yet that he reported it to be dry land because he understood that the State, district and supreme courts, in a suit between Tubbs and Kile *as to that eighty* and the eighty immediately west thereof, had decided them to be dry and not swamp and overflowed. Wherefore he reports to the Commissioner that "In view "of that fact and the decision of the District Court and the "Supreme Court of the State in the case of Kile *vs.* Tubbs, "I have thought it best to adhere to the decision of the "State tribunals."

And, thereupon, the Commissioner, on December 14, 1870, directed the Surveyor General to change the representation of these two eighties upon the township plat, because,

"In your letter of May 17, 1870, reporting on the segre- "gation of swamp lands in township 4 N. 5 E., Mt. D. M., "I find that the south half of the south half of section 11, "in said township had been adjudicated by jury and the "court adversely to the claim of the State under Swamp "Land Act."

And in his subsequent decision of February 27, 1872, the Commissioner made no further decision as to said S. half, or the S. half of 11, but simply *referred* to his former order of December 14, 1870.

There was, therefore, in all these letters and reports no decision as to the character of said tracts as matter of fact upon proofs taken; but simply an acceptance of, or acquiescense in, a supposed decision by the State courts in a suit between Kile and Tubbs.

But as appears by Finding XX, Record, p. 10:—

"But in fact no such adjudication has been made except "as to the south half of the south*west* quarter of said sec- "tion 11."

The tract here in suit is the south half of the south*east* quarter of 11, which was not even claimed by Tubbs until May 8, 1873. (Finding XVI.)

2d. As to the alleged effect of the suspension of the township plat in 1865, and of its alleged restoration in amended form in 1870.

When this township plat was filed in 1864, there was no statute nor regulation which required the approval of the Commissioner. His authority was purely supervisory, and might never be exercised. If exercised, and the survey was not ultimately set aside, it would stand as of its original date. Section 2223, 4th sub-div., and section 2395, 8th sub-div., R. S., impose upon the Surveyor General the duty of making out, recording and filing triplicate plats of township surveys. In Frasher *vs.* O'Connor, 115 U. S., p. 114 and treating of public surveys it was held, that

"It is not necessary, as in the case of the surveys or pri-
"vate land claims under other laws, to obtain the previous
"approval of such department before it becomes opera-
"tive."

And the Court therein further quoted with approval a decision by the Secretary of the Interior, as follows:

"In illustration of the manner in which public lands
"when once surveyed, can be disposed of, the Secretary re-
"fers to the Act of Congress approved May 1, 1796, pro-
"viding for the sale of lands of the United States in the
"territory northwest of the river Ohio and above the mouth
"of the Kentucky river. The Surveyor General was author-
"ized to prepare plats of township surveys, to keep one copy
"in his office for public information and to send other cop-
"ies to the places of sale and to the Secretary of the Inte-
"rior. The present local land offices, said the Secretary,
"are equivalent to the places of sale mentioned in the
"act of 1796, and, as a matter of practice, from that
"day to the present time, the township plats prepared by
"the Surveyor General have been filed by him with the
"local land officers, who thereupon have proceeded to dis-
"pose of the public lands according to the laws of the
"United States. *There was* nothing in the act of 1796, or
"any subsequent acts, which required the approval of the
"Commissioner of the General Land Office before the sur-
"vey became final and the plats authoritative."

The supervisory authority of the Commissioner over public land surveys is not denied. But that is not an arbitrary power. It does not extend to the destruction of vested rights by simply rubbing out the representation upon the face of the plat upon the strength of a mistaken understanding of a decision by State courts which was never in fact rendered; nor to authorizing such a mutilation of the face of a plat without (as in this case) changing the approval upon the face of the plat, or making a resurvey, *nor altering the field notes of the old survey in the slightest particular.* The record in this case clearly shows that no resurvey was made, and that new field notes were not made, nor the old ones changed. The representation as to the swampy character of the eighty here in suit was simply rubbed off the face of the plat. Everything else stood and stands wholly unchanged.

In that remarkable mutilation of the plat the Land Department acted with full notice of the State's claim of ownership, not only by means of the Federal survey and plat, but by direct notice as well from the State authorities. (Finding XVI.) Yet, with this knowledge, the order was founded upon nothing more than a reported adjudication by State courts adverse to the representation of the plat, which report was false in fact. (Finding XX.)

The case is well covered by Crojin *vs.* Powell, 128 U. S., 699, wherein it was said:

"It is conceded that this power of supervision and cor-
"rection by the Commissioner of the General Land Office
"is subject to necessary and decided limitations. Nor is it
"denied that, when the Land Department has once made
"and approved a governmental survey of public lands (the
"plats, maps, field notes, and certificates all having been
"filed in the proper office), and has sold or disposed of such
"lands, the courts have power to protect the private rights
"of a party who has purchased in good faith from the Gov-
"ernment against the interferences or appropriations of
"corrective resurveys made by that department subse-
"quently to such disposition or sale."

The principle of this decision is equally applicable to the case at bar, where the confirmation to the State by the Act of 1866 is sought to be defeated by a blundering correction of the face of the plat upon the faith of a pretended fact which never existed. This Court should extend the necessary protection to the State purchaser.

If, however, this withdrawal or suspension of the township plat, existing at date of the Act of 1866, and based upon a blundering misapprehension of the facts, could be held to adversely affect the vesting of title in the State cotemporaneous with the date of that Act, then the confirmation of the statute clearly took effect when said plat was restored in its original condition. "Within one year from "the passage of this Act or within one year from the re- "turn and approval of such township plats," is the direction of the statute. The record shows (Finding XIX,) that the copy of the plat which the Commissioner ordered withdrawn from the local land office, after permitting it to remain there nearly one year, he caused to be replaced in that office in 1868, and as it was then replaced without the slightest change therein, and as a basis for official business it was a recognition and declaration of its original correctness, quite as significant and authoritative as would have been a formal indorsement of approval. At any rate, the confirmation of the Act of 1866 clearly took effect from that date, and it was the plain duty of the Commissioner to have certified the lands to the State at least within one year from *that* date.

We do not overlook the claim of counsel for appellant that there is no specific evidence in the record to show by whom or for what purpose this plat was refiled in 1868 in the local land office. The record does show (Finding XIX) that on February 20, 1868, the Commissioner of the General Land Office " made a true copy of said plat *then on file* " *in his* office, together with the marginal table of areas and " certificate of approval thereon in Finding IX mentioned,

"and upon the margin of said copy the Commissioner "made and signed a certificate, of which the following is a "copy, to wit:

"GENERAL LAND OFFICE.
"*February* 20, 1868.

"I hereby certify that this is a correct copy of the plat "of township 4 north, range 5 east, M. D. M., on file in this "Office.

"JOS. S. WILSON, *Comm'r.*"

"Said copy of said plat was also certified to in due form "and substance by the Surveyor General of the United "States for California, *and said copy so certified to was there-* "*after filed in the United States Land Office for the land dis-* "*trict then embracing said township four north, range five east.* "Said copy in no respect, except as to said certificate of "said Commissioner of the General Land Office thereto, "differed from said plat which was withdrawn, as in said "Finding XIII mentioned."

This Finding clearly conducts this plat from the Commissioner through the Surveyor General to the local land office. The presumption of its official filing almost necessarily follows. By whom can plats of public land surveys be filed in local land offices?

That it was so filed officially and so remained upon file, is further made clear, because his subsequent order of December 14, 1870, directing change of the representation upon the face of the plat, required the Surveyor General to simply send *diagrams* of the change to the local office, thereby assuming a plat already on file in that office.

IV.

It is to be furthermore remarked, that even if the plat for the U. S. survey was silent upon the swampy character of the land, or was adverse thereto, the land would still enure to the State under the second clause of the 4th sec-

tion of the act of July 23, 1866. The land was segregated by the State in 1864 as swamp and overflowed, and that survey conformed to the system of United States surveys. It was therefore the duty of the U. S. Land Department to construct plats accordingly, to approve same, and to certify to the State the lands shown by the State segregation to be swamp.

The State's survey and plat of 1864 was a "segregation "map and survey," within the intent and meaning of the 2d clause of section 4 of the act of July 23, 1866, and the 2d clause of section 2488, R. S.

(*a*) The Surveyor General of the State and the County Surveyors are bound to fidelity and correctness in their performance of official duty by the obligations of an oath and bond, and act under all the legal sanctions by and to which the United States Surveyor General and his deputies are bound and held. Both make record of their official acts.

An act concerning the office of Surveyor General, Sessions Laws of California, 1850, ch. 104, secs. 2, 9, (pp. 256, 7.)

An act prescribing the duties of County Surveyors, *id.*, ch. 67, secs. 1, 2, (pp. 170, 1).

An act concerning the official bonds of officers, *id.*, ch. 21, p. 74.

Then by "An act to provide for the sale of the swamp "and overflowed lands belonging to this State," approved April 28, 1855, (Session Laws, 1855, ch. 151, page 189), it is provided:

"All surveys made under the provisions of this act shall "be according to instructions from the Surveyor General "of this State, which instructions shall be as near as prac- "ticable in accordance with the surveys of the public lands "of the General Government." (Sec. 12.)

By "An act to provide for the sale and reclamation of "the swamp and overflowed lands of this State," ap-

proved April 21, 1858 (Session Laws 1858, ch. 235, page 198), it is provided:

"All surveys under the provisions of this act shall be "made according to the instructions from the Surveyor "General, and shall be made to conform to the surveys of "the public lands by the General Government, except that "the lands held by actual settlers shall be surveyed after "what is known as the geodetic method, and such geo- "detic surveys shall be made to conform to the lines and "boundaries established by such settlers" (section 11).

By "An act to provide for the reclamation and segrega- "tion of swamp and overflowed, and salt marsh and tide "lands, donated to the State of California by act of Con- "gress," approved May 13, 1861 (Session Laws 1861, ch. 352, page 355,) it is provided:

"The county surveyors of the several counties of this "State shall, immediately after the organization of the "Board of Commissioners, proceed to segregate the swamp "and overflowed lands within their respective counties from "the high lands in said counties, and make complete maps "of all the swamp and overflowed lands, within their respec- "tive counties, in legal subdivisions of sections and parts of "sections, together with a tabular statement of all such "lands as have been sold by the State, and under what act "the same were sold, of all lands claimed and by whom "claimed, and as nearly as possible by what title the same "are held, and file the said tabular statement in the "County Recorder's Office of their respective counties, "also transmit duplicates of said maps to the Surveyor "General of the State: Provided, however, That it shall be "discretionary with the Board of Commissioners whether "land *already surveyed and segregated under any former act* "for the sale and reclamation of swamp and overflowed "lands shall be *segregated or surveyed under this act.*" * * (Sec. 19.)

"The Surveyor General shall compile a general map of "the State in duplicate, showing all the swamp and over- "flowed lands of the State, which shall have been returned "by the county surveyors as the property of the State, "together with the county boundary lines where crossing

"the same. He shall also enter thereon the number cor-
"responding with the affidavit; he shall also compile from
"the testimony received and on file in his office a general
"schedule of the swamp lands in the State by their de-
"scription; he shall also distinguish on said map the
"lands already sold by the State as swamp and everflowed;
"he shall prepare a report showing any cases in which the
"swamp lands have been infringed upon by the United
"States Government surveys." (Sec. 21.)

And see section 26, *id.*

By "An act to provide for the management and sale of
"the lands belonging to this State," approved March 28, 1868 (Session Laws 1867-'68, ch. 415, page 507), it is provided:

"All surveys made under the provisions of this act shall
"be according to the instructions of the Surveyor General,
"and *shall be made according to the rectangular system adopted*
"*by the United States in the survey of the public lands*, and shall
"conform as near as practicable to the lines of the public
"surveys; *Provided*, That in salt marsh or tide land surveys
"the Surveyor General may order a departure from said
"system." (Sec. 19.)

And by section 16 (*id.*) the Surveyor General is required to issue the necessary instructions in respect to surveys.

The act of April 27, 1863, entitled "An act to provide
"for the sale of certain lands belonging to the State" (Session Laws 1863, ch. 397, page 591), under which the first survey for the State was made, provides that the County Surveyor shall mark upon the map and record in the books of his office all approved surveys (Sec. 7).

Further: "The Surveyor General shall keep at his office
"complete maps of the State, so far as surveys have been
"returned to him, upon which shall be shown all the lands
"sold by the State, and all surveys of land applied for which
"have been approved by him, showing, also, all lands for
"which certificates of purchase or patents have been is-
"sued." (Section 9.)

The same officer as *ex officio* "Register of the State Land "Office" was required "to keep in a well-bound set of "books a complete record of all swamp and overflowed "lands. * * * He shall also keep the proper plats of "the above-named lands, upon which plats all approved "locations and surveys shall be designated by their num- "bers; and when certificates of purchase or patents shall "have been issued, the same shall also be noted on the plats. "But so long as the Surveyor General performs the duties "of Register, but one set of maps shall be required." (Section 13.)

And by section 27 (*id.*) the Surveyor General is authorized to issue all necessary instructions concerning surveys.

The act of *March* 28, 1868 (*supra*), under which the second survey for the State was made, makes it the duty of the Surveyor General as *ex officio* Register "to keep sepa- "rate, distinct and complete accounts and records in re- "lation to each class of lands to which the State is or "may be entitled; which accounts and records shall show "the number of the survey or location, the date of the ap- "proval, the name of the locator, the description of the "land by township, range, section and subdivision of sec- "tion. * * *

"He shall also keep the proper plats of the above-named "lands, upon which all approved locations and surveys shall "be designated by their numbers; and when certificates "of purchase or patents shall have been issued, the same "shall also be noted on the plats. But so long as the Sur- "veyor General performs the duties of Register, but one "set of maps shall be required." (Section 3.)

By section 18 of the same act it is provided:

"It shall be the duty of the county surveyor, immediately "upon his receiving an application for any survey required "by this Act, to endorse the date of the receipt thereon, and "note the same in a book to be furnished by the Surveyor "General and kept in his office for that purpose, in the

"regular order in which it is received, giving the name "and address of the applicant and the description of the "land by township, range, section, and subdivision of sec- "tion, which book shall always be open for public inspec- "tion. He shall, within thirty days after receiving such "application, if the lands are subject to sale, complete the "survey, plat, and field notes, which shall be recorded by "him in a book kept in his office for that purpose; and du- "plicate copies thereof, together with a copy of the applica- "tion, shall be forwarded to the Surveyor General for ap- "proval. The said county surveyor shall, immediately "upon the receipt of an approved survey, record said ap- "proval; he shall mark all approved surveys upon the maps "of his office, and all his said books and maps shall at all "times be open to public inspection."

And section 10, of the same act, reads:

"It shall be the duty of the Surveyor General to ex- amine all surveys made under the provisions of this Act, "and, if found correct, approve and return the same with- "out delay to the county surueyor making the same."

Thus it is seen that the State surveys were made in the field, by her sworn officer in charge of her lands, under instructions to conform, and in actual conformity with the Governmental system.

It will be presumed that these officers acted in strict accordance with the law and the instructions, and that the Surveyor General, *ex officio* Register of the State Land Office, made all the statutory entries in the records and on the maps in his office showing the land to be of the class as claimed.

Bank of U. S. *vs.* Dandridge, 12 Wheat., 70;
Gonzales *vs.* Ross, 120 U. S., 606.

This method of State segregation in small parcels not exceeding 640 acres, commencing with the act of April 28, 1855 (*supra*), sec. 10, has ever since been followed.

Act of April 21, 1858, *supra*, sec. 2;
Act of May 13, 1861, *supra*, sec. 26.

That the State held these surveys of small parcels to be surveys of *segregation* is clearly declared in the cited *section* 19 (*supra*) of the last-named act, wherein the Legislature says:

"*Provided, however*, That it shall be discretionary with "the Board of Commissioners whether land *already sur-* "*veyed and segregated under any former act* for the sale and "reclamation of swamp and overflowed lands shall be *re-* "*segregated* or surveyed under this act."

So, again, Congress recognized by the act of July 23, 1866, surveys of this class as *segregation* surveys.

The proviso in section 4, referring to surveys "made by "said State," declares:

"That in segregating *large* bodies of land, notoriously and "obviously swamp and overflowed, it shall not be necessary "to subdivide the same, but to run the exterior lines of such "body of land."

The statute had in view *every* segregation survey for dispensing with (as it does) subdivisions "of large bodies," it impliedly sanctions the surveys of *small* bodies wherein the subdivision rule must have been observed.

And this applies as well to the 2d clause of sec. 2488 (Rev. Stat).

The two second clauses in question, in effect (to the end that titles be quieted), render the State's record as decisive against the General Government as is the Government's own record of the same fact referred to in the several first clauses hereinbefore considered, except that as a condition precedent to the operation of the second clauses "the State sur- "veys must conform to the system of surveys adopted by "the United States." In every case wherein the State survey accords with that system these provisions render the field-notes of the Surveyor General of the State, and his maps based thereon, as conclusive of the character of

"swamp and overflowed" as are the field-notes and maps of the like officer of the United States.

For land in other conditions, to wit, where the State's survey is not on that system, or where there has been no township survey by the United States or the State, shall "claim as swamp and overflowed any land not represented "as such upon the map or in the returns of the surveyor," the statutes provide special remedies in their respective 3d and 4th clauses.

It was nothing new in the administration of this grant to recognize the State's record and map as the rule of decision (United States *vs.* Louisiana, 123 U. S., 37); and Congress imparted to it, in respect to California, the form of an enactment with an added property of *conclusiveness* against the Government.

V.

Assuming (what does not appear by the record here) that the investigation which resulted in the Commissioner's order of December 14, 1870, and his subsequent decision of February, 1872, was had upon notice to and the participation of the State and of her purchaser in that proceeding, these facts could not confer jurisdiction over the subject. (Poppe *vs.* Athearn, 42 Cal.)

The land, until Tubbs' entry, never had been under any claim adverse to that of the State. (Finding XV.) The township survey and plat had stood regularly approved (and re-approved) of record for some five years before this investigation was initiated. Years before this initiation, the land had been completely severed, by the several acts of Congress in question, from the "public domain," and (in the language of Sec. 2479, Rev. Stat.) *belonged* to the State. Its character "as swamp and overflowed" had been finally fixed by the 4th section of the act of 1866, operating of itself and without the action of the Secretary of the Interior. (Wright *vs.* Roseberry, *supra.*)

Hence the unauthorized investigation, and the following order of December 14, 1870, and the decision of February 2, 1872, work no estoppel or other prejudice to or upon the State or her purchaser. (2 Hermann on Estoppel, 1365.)

The plaintiff's settlement was not made for nearly ten years after the identification of the Government's survey and plat. Patent was not issued to him until about three years later. As early, at least, as July 1, 1864, the State assumed control and possession of the land, sold it in the same year, and issued her patent for it in 1865. (Findings X, XI, XII.)

The patent to the plaintiff conveyed nothing, and is of no validity whatever.

Martin *vs.* Marks, *supra;*
Ryan *vs.* Carter, *supra;*
Stoddard *vs.* Chambers, 2 How. U. S., 284;
Shipley *vs.* Cowen, 91 U. S., 336;
Doolan *vs.* Carr, 8 Sup. Ct. Rep., 1228;
Miller *vs.* Tobin, 16 Pac. Rep., 161;
Weber *vs.* Pere Marquette Boom Co., 62 Mich., 266.

It is respectfully submitted that there is no error in the judgment of the Supreme Court of California, and that the same should be affirmed.

A. T. Britton,
A. B. Browne,
Attorneys for Defendant in Error.

APPENDIX.

U. S. SUR. GENL'S OFFICE,
SAN FRANCISCO, *May* 11, 1870.

HON. JOS. S. WILSON,
Commissioner Gen'l Land Office,
WASHINGTON, D. C.

Sir: I have the honor to submit herewith my report on the lands claimed by the State of California as swamp and overflowed lands in township 4 north, range 5 east, Mt. Diablo Meridian.

The western half of this township except sections 4 and 9 is not in controversy, being returned as indisputably swamp land. There are also portions of sections 15, 22, 27 and 34 in the same category, as may be seen by the official plat. But in regard to sections 4, 3, 10, 11, the east half and northeast quarter of section 9, segregated by the U. S. Deputy Surveyor Handy as swamp and overflowed, the fairness and honesty of the segregation has been called in question by parties claiming the land as pre-emptors who had settled previous to the survey, and who aver that the lands should be classed as dry. This controversy has been going on for several years since 1862; has been tried, in respect to some of the land, several times in the State district courts, and has been adjudicated by the Supreme Court of the State.

The only tract properly before me under the provisions of section 4 of the act of 23d July, 1866, is the northeast quarter of section 14, claimed by the State as swamp and overflowed, but segregated by the U. S. Deputy as dry land, and claimed as such by Silas Tubbs, a pre-emption settler. Mr. Tubbs, at the late hearing of the case in Stockton, having exhibited a U. S. patent for that quarter

section, the attorney for the State withdrew from the contest, so far as that quarter section was concerned.

The other tracts named have been under my scrutiny upon a charge of wilful malfeasance or great error of judgment on the part of the Deputy Surveyor, Handy, who subdivided the township and segregated the swamp lands. The Commissioner of the General Land Office has instructed the Surveyor General to have the land re-examined, and if necessary re-surveyed; and if the segregation is found to be wrong, to collect the expense of the re-survey from the deputy.

But inasmuch as the deputy went off to Mexico soon after the survey, leaving behind him many unpaid debts, and has never returned to this country, it has been thought best to test the question, without regard to any malfeasance of his, solely by the actual condition of the lands as determined by evidence. Neither of the parties litigant showed any disposition at the examination, either to impugn or defend the character of Deputy Handy.

The evidence having shown that the segregation was based upon a contour line determined with a leveling instrument, I determined, after a hasty inspection of the ground in person, to send a competent engineer to take a series of levels. His report, plan and profiles are herewith submitted. He is the same person who took the levels in the swamp land cases in T. 2 and 3 N., Ranges 6 and 7 East, near Stockton, and is perfectly reliable professionally, and entirely impartial.

The results of his work seem to corroborate generally the lines as run by Mr. Holman, the assistant of Deputy Handy, so far as concerns the greater portion of the disputed tracts. Some exceptions may perhaps be made.

My visit to the land was without previous notice to the parties interested, and my other engagements allowed me to spend only from 8 in the morning till noon in the vicinity. During one of my trips to examine the Western Pacific Railroad as a special commissioner, on the 8th June,

1869, I noticed that the Mokelumne River was very high—so high as to seriously retard the operation of placing the foundation of a railroad bridge, and I seized the opportunity to look at the lands in question at the summer flood time—"the June fresh."

I drove along the southern and western boundaries of section 11, and found the land level and showing the usual irregularities of what they call "hog wallow-land," a term not easily understood without knowing the Stockton and Sacramento plains. It indicates flat lands over which water periodically flows in irregular currents in all directions, till the land acquires a wavy appearance. It was dry enough when I saw it, except some pools on the north half of section 11. I found the river on the 9th June, opposite Kiles, nearly bank full. Two or three inches more would have caused it to overflow its highest banks if no levees were there, and of course at the low places and heads of sloughs it would have run out at the level at which I saw it, and inundate the lower lands. There was a levee of two to four feet high along the river for a mile or two, and a stronger bank at the sloughs. Through a sluice gate the water was running down with a brisk current from the river into the low meadow northeast of Kiles' house. In the lowest part of the meadow tules were growing and water was standing in pools. Kiles' house is on one of the flat knolls. I saw grain growing on sections 2 and 3, and water flowing through it in a ditch and spreading out beyond the ditch through the grain. The land was rich black or brown soil, fertile, and well adapted for cultivation. I had not time to visit Thompson's or Robinson's houses nor Tubbs', but resolved to send an engineer with a level to determine what the unaided eye could not. It was plain to me that the lands were valuable as grazing lands without levees, but in general that levees were needed to culivate securely the staple crops in all years. The flood water was very cold, and plainly told its origin among the snows.

I made it a point to visit the head of Jack Abell's slough.

(See Goodyear's map.) I there found a strong earth dam about 150 yards long, apparently six or eight feet high in the middle, tapering off to the higher lands on each side. I drove my buggy across the top of the dam. I questioned the person in charge, living in the house near it, and he told me the object of the dam was to keep the water of the river from flooding the country for several miles below.

It was plain that it would be doing so at that moment were the dam not there. Several smaller sloughs were also leveed at the head. It is plain also that for some reason or other the levees are made, and the practical inference must be that they are necessary.

Complaint having been made that witnesses for the State had been examined in San Francisco without notice to the other parties, I ordered another hearing to be held at Stockton on the 21st February last. Printed notices of this hearing were served on the principal parties and their attorneys on both sides. The claimants under the United States only put in an appearance by their attorney so far as the south half of the southwest quarter of section 11 was concerned. He filed the transcript of the record of judgment before the district court of the Fifth District of the State, on a trial in relation to that tract, and he declined to offer any further testimony in favor of his client, or to cross-examine the witnesses of the opposite party. Neither the principals nor the attorneys of parties opposing the claim of the State to the other tracts named put in an appearance.

After a careful examination of the evidence in the case, and of the papers on file, and the plans and profiles of Deputy Goodyear, I see no reason to change the segregation of Deputy Handy, except as regards the south half of the south half of section 11, which I class with the dry lands. In one of the traced copies on file in the case of a part of the State segregation map of 1861, which accompanies the State Surveyor General's letter of April 24th, 1863, to the U. S. Surveyor General, this tract is not classed with the swamp lands. In view of that fact and the decision of the District

Court and the Supreme Court of the State, in the case of Kile *vs.* Tubbs, I have thought it best to adhere to the decision of the State tribunals.

Referring to my general remarks in the swamp land cases nearer Stockton, in relation to the alternations of wet and dry years, I remain

Very respectfully your obedient servant,

SHERMAN DAY,

U. S. Surveyor General for California.

U. S. SURVEYOR GENERAL'S OFFICE,
SAN FRANCISCO, 17*th May*, 1870.

Hon. JOS. S. WILSON,
Com'r Gen'l Land Office,
Washington.

SIR: In a separate package by to-day's mail I transmit the papers and testimony in regard to certain lands in T. 4 N., R. 5 E., Mount Diablo Meridian, claimed by the State of Cal. as swamp and overflowed, but segregated by the U. S. Dep. Sur. as high, accompanied by my opinion.

Very respectfully, your obedient servant,

SHERMAN DAY,

U. S. Surveyor General for California.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
December 14*th*, 1870.

SHERMAN DAY, ESQ.,
Surveyor General,
San Francisco, Cal.

SIR: In your letter of May 17th, 1870, reporting on the segregation of swamp lands in township 4 N., R. 5 E., Mt. Diablo Meridian, I find that the south half of the south half

of section 11, in said township had been adjudicated by jury and the court adversely to the claim of the State under swamp land act.

You will therefore represent the said legal sub-divisions laid down on the official township plat as "swamp and over-"flowed land" per plat approved June 30, 1864, by extending the lines in red ink over the same, and express their contents, sending authenticated diagrams thereof to this Office and to the proper Register of the District Land Office I am very respectfully,

Your obedient servant,

JOS. S. WILSON,
Commissioner.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *February* 27, 1872.

U. S. SURVEYOR GENERAL,
San Francisco, Cala.

SIR: This office has examined the evidence in the investigation held at Stockton February 21, 1870, before the late Surveyor General Day in regard to the correctness of the segregation of swamp and overflowed lands in Township 4 North of Range 5 East, Mount Diablo Meridian, as shown on the official plat of said Township approved June 30, 1864. The objections to said segregations were confined to the following tracts, to wit: All of section 3; the east half of section 4; all of section 10; the south half of sections 11 and 12, and the north half of section 15. The Surveyor General transmitted the evidence in the case to this Office in May, 1870, together with his decision, in which decision he sustained the correctness of the original segregation of swamp lands, as shown on the plat, except as to S. ½ of S. ½ of section 11, which he held to be dry lands. The General Land Office, in 1870, affirmed the decision of the Surveyor

General as to the S. ½ of S. ½ of section 11, and ordered the plat to be amended accordingly, which was done.

That part of the Surveyor General's opinion sustaining the remainder of the original plat as to all the lands returned thereon as swamp lands, has this day, together with the testimony, been considered by this office and his decision affirmed.

You are therefore directed to notify all parties in interest, and particularly all occupants of the land in controversy, and every person who may have filed, or offered to file pre-emption or other claims thereto, in the local land office so far as they may be known, of this decision, and allow 60 days after such notice for appeal.

Very respectfully, your ob't serv't,

WILLIS DRUMMOND, *Commissioner.*